Wendt Corporation *and* Shopmen's Local Union No. 576. Cases 03–CA–212225, 03–CA–220998, and 03–CA–223594

July 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 15, 2019, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[3]

I. BACKGROUND

The Respondent designs and manufactures systems and machinery used by the scrap-metal recycling industry. On June 23, 2017, the Board certified a unit of the Respondent's production and maintenance employees, consisting of approximately 33 individuals. The parties commenced negotiations in July 2017, meeting 36 times without reaching agreement or impasse. The judge found that the Respondent, during the bargaining process, committed multiple violations of Sections 8(a)(1), (3), and (5) of the Act. We affirm in part and reverse in part.

II. DISCUSSION

A. The 8(a)(1) Findings

The judge found that the Respondent, by its Plant Manager Daniel Voigt, committed numerous violations of Section 8(a)(1) of the Act during the bargaining period by threats and other statements to prounion employees. The Respondent does not dispute the vast majority of these findings, which we adopt in the absence of exceptions.[4] The Respondent has excepted, however, to the judge's finding that the Respondent violated Section 8(a)(1) of the Act by its written evaluation of Dmytro Rulov and by refusing employee John Fricano's request for a *Weingarten*[5] representative. For the reasons set forth in his decision, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act as alleged.[6]

[1] The Respondent excepts to the judge's denial of its request that it be provided with all employee witness statements at the outset of the hearing. We find no merit in that exception. The judge's determination comports with the Board's longstanding rule that employee witness statements be supplied to opposing counsel only after a witness has testified. See Sec. 102.118(e) of the Board's Rules & Regulations; *H. B. Zachry*, 310 NLRB 1037, 1038 (1993); *Edwards Trucking*, 129 NLRB 385, 386 fn. 1 (1960).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias against it. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We amend the judge's recommended remedy to provide that make-whole relief for the employees unlawfully laid off by the Respondent shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), while the make-whole remedy applicable to the Respondent's additional unfair labor practices shall be computed in accordance with *Ogle Protection Service*, *Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest in all of these instances as set forth in the judge's decision. We further amend the recommended remedy to provide for rescission of the Respondent's unlawful removal of unit work. "'Pursuant to the Board's established policy, in cases such as this involving a violation of Sec. 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible.'" *Capitol Ford*, 343 NLRB 1058, 1059 fn. 6 (2004) (quoting *Detroit News*, 319 NLRB 262, 262 fn. 1 (1995)). We have modified the judge's recommended Order in accordance with our recent decision in *Danbury Ambulance Service*, *Inc.*, 369 NLRB No. 68 (2020), and to conform to the violations found and to the Board's standard remedial language. We have substituted a new notice to conform to the Order as modified.

[4] The Respondent has not excepted to the judge's findings that the Respondent, by Voigt, violated Sec. 8(a)(1) of the Act by (a) interrogating Dale Thompson about his union support; (b) threatening Thompson with unspecified reprisals for wearing a union logo; (c) implying Thompson would receive a wage increase if he ceased his support for the Union; (d) informing Thompson that union supporters would be laid off; (e) threatening Thompson with reprisals by implying he should not support the Union because he had a family to support; (f) on multiple occasions creating the impression of surveillance of employees' protected activity; (g) impliedly instructing Jeff George to remove union insignia; (h) informing George that prounion employees were targeted for future layoff; (i) instructing George to remove a prounion photograph from his Facebook page; and (j) threatening Dmytro Rulov during his annual performance review.

Having adopted the judge's finding that the Respondent unlawfully interrogated Thompson, we find it unnecessary to pass on whether the judge properly dismissed the allegation that Plant Manager Voigt violated Sec. 8(a)(1) of the Act by interrogating George because such an additional finding would not affect the remedy.

[5] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[6] The disciplinary document given to Fricano, with the option for him to check a box that he agreed or disagreed with the above statements

B. The 8(a)(3) Findings

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Dennis Bush for alleged violation of its anti-harassment policy, assigning William Hudson exclusively to saw work and refusing him overtime, and failing to provide annual performance reviews and accompanying wage increases to unit employees from about November 2017 through April 2018. We agree with each of these findings as further discussed below.

We reverse, however, the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by temporarily laying off 10-unit employees in February 2018. The complaint does not allege that the Respondent violated Section 8(a)(3) and (1) in this regard, the General Counsel conceded at the hearing that he was making no such allegation, and the issue was not litigated. Accordingly, we reverse the judge's finding of this unalleged and unlitigated violation.

1. The suspension of Dennis Bush

The Respondent receives products from a German company in boxes printed with "F.A.G." in black letters. With the Respondent's apparent knowledge and consent, employees frequently re-use the boxes in the course of their work. On December 21, 2017, Bush delivered such a box to employee Robert Domaradski, who had requested a box for work. Bush was an active union supporter and was wearing a union shirt during this incident. Plant Manager Voigt saw Bush delivering the box to Domaradski. Bush held up the box and laughed. Manager Voigt took no action to caution Bush, prevent delivery of the box, or otherwise intervene. Instead, he snickered approvingly. Bush continued walking toward Domaradski, set the box down and said, "Here's your box." Both he and Domaradski laughed. Bush left. The Respondent thereafter suspended Bush for 3 days without pay for violating its anti-harassment policy.

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Bush for this incident. The Respondent does not contest that the General Counsel established a prima facie case of discrimination under *Wright Line*.[7] Rather, the Respondent excepts to the judge's finding that it did not meet its *Wright Line* defense burden of showing it would have suspended Bush, even absent his union activity, for violating its anti-harassment workplace policy and to prevent a hostile work environment.

Like the judge, we recognize that the Respondent maintains a zero-tolerance policy for workplace harassment and that it is not our place to second-guess discipline the Respondent imposes for violations of that policy. But having carefully reviewed the record, we find little support for the Respondent's defense that its motive in suspending Bush was to vindicate its policy of eliminating sexual harassment in its workplace.

Rather, we find that the Respondent did not treat the incident as one of bona fide harassment. Although the Respondent's policy provides that complaints of harassment "will be investigated promptly," the Respondent did not interview Bush, Domaradski, or others who witnessed the event.[8] Where, as here, an employer's policy or practice is to investigate misconduct allegations, its failure to conduct an investigation indicated that it did not treat the incident as misconduct, and thus that its purported justification for discipline was pretext. And where the employer's proffered reasons "are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

Moreover, the Respondent's defense burden under *Wright Line* is not to identify legitimate grounds for which it *could* impose discipline, but to persuade that it *would* have disciplined the employee even absent his or her protected activity. E.g., *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). The Respondent has failed to do so because its actions are strikingly inconsistent with its expressed concerns regarding workplace harassment. An employer that maintains materials in the workplace that are printed with initials such as "F.A.G." for legitimate commercial reasons may well be oblivious to the possibility that they are susceptible to misuse. One would expect, however, that an employer concerned about harassment in its workplace would take action after being apprised of such misuse. Yet here, even though the Respondent's

describing the incident and a section for comments, was minimally sufficient to convert the meeting into a *Weingarten* interview. See *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) (finding that if an employer seeks facts or evidence in support of a disciplinary action or to have an "employee admit his alleged wrongdoing or to sign a statement to that effect" during a meeting to issue predetermined discipline, then an employee's right to union representation attaches).

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Even if the Respondent had not conceded, in its exceptions brief, that the General Counsel satisfied his initial burden, we would have no trouble concluding that he did so.

[8] The Respondent argues that its failure to investigate is irrelevant because Bush admitted to engaging in misconduct. We disagree. Bush admitted to saying "here's your box" and laughing. He did not admit that this was misconduct, and whether or not it was, the Respondent did not treat it as such by adhering to its policy and investigating. Its failure to do so suggests a determination to avoid discovering potentially mitigating circumstances.

management was purportedly concerned enough to hand out a 3-day suspension based on Bush's conduct, the Respondent did nothing. It did not take immediate steps to remove the boxes from the workplace or implement any other measure to mitigate the potential for misuse, such as requiring the letters to be covered up. Indeed, Domaradski still had the box under his workbench at the time of the hearing, with the prominent letters "F.A.G." facing out and visible to all other employees, managers, and visitors. The Respondent's conduct is simply not consistent with that of an employer seeking to prevent harassment in the workplace.

An employer concerned about workplace harassment also would have required more of its managers, particularly a manager involved in the specific incident. Yet the Respondent took no action against Plant Manager Voigt, who condoned and participated in the incident by laughing along with Bush. There is no evidence that the Respondent reminded Voigt and other managers of their responsibility to prevent workplace harassment, let alone disciplined Voigt for making light of what the Respondent deemed an anti-gay slur. The Respondent also took no action against Voigt for failing to file a complaint about the incident despite having witnessed it and despite being required to report it under the Respondent's anti-harassment policy.[9] The Respondent's "zero tolerance" defense simply cannot be squared with its conspicuous failure to take any action against workplace harassment other than singling out a leading union supporter for discipline.[10]

2. The assignment of William Hudson to saw work

We agree with the judge, for the reasons set forth by him as further discussed below, that under *Wright Line* the Respondent violated Section 8(a)(3) and (1) of the Act by assigning highly-skilled welder and prominent union activist William Hudson exclusively to low-skilled saw work upon his return from layoff and refusing him any opportunity to work overtime.

The Respondent primarily excepts to the judge's finding of animus. The judge's finding is premised on the numerous undisputed unlawful threats and statements by Plant Manager Voigt. The Respondent asserts that there is an insufficient causal connection between Voigt's threats and its treatment of Hudson to merit finding that the General Counsel met his initial burden under *Wright Line* of showing that the Respondent's union animus was a motivating factor in its decision to assign Hudson to low-skilled saw work and deny him overtime.

In *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019), the Board held that "to meet the General Counsel's initial burden [under *Wright Line*], the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." The Board explained:

> [W]e emphasize that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line* . . . . We continue to adhere to the Board's longstanding principle that proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole . . . . [E]vidence that an employer has stated it will fire anyone who engages in union activities, while undoubtedly "general" in that it is not tied to any particular employee, may nevertheless be sufficient, under the circumstances of a particular case, to give rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action. In contrast, other types of circumstantial evidence—for example, an isolated, one-on-one threat or interrogation directed at someone other than the alleged discriminatee and involving someone else's protected activity—may not be sufficient to give rise to such an inference.[11]

Applying this standard, we find that the General Counsel has adduced evidence of the Respondent's union animus that is more than sufficient to support a reasonable inference of a causal relationship between Hudson's union activities and the Respondent's adverse actions against Hudson. The Respondent's repeated threats, while made

[9] Under the Respondent's policy, "[t]he reporting of all incidents of . . . harassment . . . is mandatory." Moreover, supervisors or managers who witness harassment but fail to intervene or report it expose their employer to liability. See, e.g., *McKenzie v. Illinois Department of Transportation,* 92 F.3d 473, 480 (7th Cir. 1996) (employer liability for harassment by coworkers limited to situations where employer knows or should have known about harassment), cited favorably in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (1998).

[10] In rejecting the Respondent's defense, we reiterate the Board's commitment to administering the NLRA in harmony with prohibitions on workplace sexual harassment specifically and federal employment discrimination law generally. See *General Motors LLC*, 369 NLRB No. 127 (2020); *Park 'N Fly, Inc.*, 349 NLRB 132, 136 (2007) ("Employers have a legitimate interest in preventing workplace sexual harassment and an obligation to respond when such incidents occur."); see also *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another.").

[11] *Tschiggfrie Properties*, slip op. at 8 (quotations and citations omitted; emphasis in original).

in each instance to a single employee, expressed a general threat to all employees by, for example, threatening to target union supporters for layoff and to get rid of "a lot of" shop employees. The Respondent additionally invoked its entire work force when, on multiple occasions, it unlawfully created the impression of surveillance, telling employees it had cameras that could "see everything that [employees were] doing on the internet." These are not the type of isolated, one-on-one threats or statements in which animus is properly cabined to the recipient under *Tschiggfrie Properties.* Further, circumstantial evidence of animus under *Tschiggfrie Properties* is clearly established by the Respondent's disparate treatment of Hudson. The Respondent singled him out from the other laid-off welders by denying only him any welding work and any overtime work opportunities, and instead making him the sole welder assigned exclusively to the low-skill saw. See *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (unlawful motive inferred from evidence of disparate treatment), cited with approval in *Tschiggfrie Properties*, slip op. at 8.

We accordingly find that the General Counsel has met his burden of showing animus under *Tschiggfrie Properties,* and thus agree with the judge that the General Counsel has met his *Wright Line* burden of showing that the Respondent was unlawfully motivated in limiting Hudson's work. We further agree with the judge, for the reasons set forth by him, that the Respondent failed to meet its defense burden of showing it would have taken the same action towards Hudson even absent his protected union activity.

3. The delay in performance reviews and wage increases

The Respondent's employment manual provides for annual performance reviews for employees. In 2016, the Respondent provided unit and nonunit employees performance reviews in the same time frame, and shortly thereafter gave wage increases to all employees based on the evaluations. Following the Union's certification, however, nonunit employees received their reviews and concomitant wage increases in late 2017, but unit employees did not receive their reviews and wage increases until mid-April 2018.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by delaying reviews and thus depriving unit employees of their pay increases for approximately 6 months. The Respondent again invokes *Tschiggfrie Properties* to argue that the General Counsel failed to satisfy his burden of showing animus by the Respondent towards union or protected activity sufficient to support an inference of unlawful motivation for its dilatory conduct vis-à-vis unit employees.

Contrary to the Respondent's arguments, the record here clearly establishes substantial evidence of animus. First, as explained above, the Respondent made the very types of general threats specified in *Tschiggfrie Properties* as potentially sufficient without more to sustain the General Counsel's burden of proof. Second, compelling circumstantial evidence of the Respondent's discriminatory motive is established here under *Tschiggfrie Properties* based on the inconsistencies in its proffered reasons for the 6-month delay.[12] Thus, the Respondent asserts that the shop where unit employees worked was too busy with orders in late 2017 to allow any time for performance reviews for unit employees, and that production demands did not ease sufficiently until mid-April 2018, when it finally had the time to complete the reviews. This explanation is flatly contradicted, however, by the Respondent's conflicting assertion that it was compelled to lay off 10 shop employees on February 8, 2018, because the shop had so little work at that time.[13] The Respondent also ascribes its delay in granting unit employees a wage increase to its obligation to negotiate over the increases, but this explanation is belied by its contemporaneous refusal to bargain with the Union on this topic. When the Union requested bargaining over the wage amounts on November 3, 2017, the Respondent refused. The Respondent's proffered reasons for its delay in furnishing performance reviews and corresponding wage increases to unit employees are inconsistent and shifting; as such, they provide significant additional evidence that the delay was unlawfully motivated.[14] In addition, those same proffered reasons are plainly pretextual, which defeats any attempt on the Respondent's part to sustain its *Wright Line* defense burden.[15] We accordingly agree with the judge that the

[12] See id., slip op. at 8; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Zengel Bros.*, 298 NLRB 203, 206 (1990) (employer's failure to offer a consistent account of its actions permits an inference that the real reason for its conduct is not among those asserted).

[13] Indeed, the judge essentially discredited the Respondent's "too busy" defense on demeanor grounds.

[14] See *Sound One Corp.*, 317 NLRB 854, 858 (1995) (where an employer has shifted reasons for its actions, "an inference may be drawn that the real reason for its conduct is not among those asserted") (citation and internal quotation omitted), enfd. mem. 104 F.3d 356 (2d Cir. 1996); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991) (noting that "it is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal"), enfd. mem. 976 F.2d 744 (11th Cir. 1992).

[15] See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("[I]f the evidence establishes that the reasons given for the [r]espondent's action are pretextual—that is, either false or not in fact relied upon—the [r]espondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.").

General Counsel satisfied his initial burden under *Wright Line* with respect to the delay and that the Respondent has failed to prove its affirmative defense of demonstrating that it would have taken the same action even in the absence of the employees' protected activities.[16]

C. The 8(a)(5) Findings

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by temporarily laying off employees and by removing bargaining unit work and transferring it to newly created supervisory positions. We agree with these findings as further discussed below. However, consistent with our recent decision in *800 River Road Operating Company, LLC d/b/a CareOne at New Milford*, 369 NLRB No. 109 (2020), we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by imposing discipline on employees without giving the Union prior notice and an opportunity to bargain. We address each of these issues in turn below.[17]

1. The layoff of employees

The Respondent temporarily laid off 10 shop employees on February 8, 2018. It gave the Union advance notice of the layoffs, but the layoffs were carried out at a time when the parties had not reached overall impasse in negotiations for a collective-bargaining agreement as a whole. The judge found that the layoffs violated Section 8(a)(5) and (1) of the Act under *Bottom Line Enterprises* because the Respondent implemented the layoffs in the absence of overall impasse. 302 NLRB 373 (1991), enfd. mem. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).[18]

The Respondent argues that it was privileged to implement the layoffs unilaterally pursuant to its past practice under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). It also contends that it was excused from bargaining to overall impasse under the "economic exigencies" exceptions set forth in *RBE Electronics of S.D.*, 320 NLRB 80 (1995). We have carefully examined the record and find that the Respondent has failed to meet its burden of establishing either affirmative defense.

In *Raytheon*, the Board held that an employer may unilaterally continue to take actions that are consistent with an operational past practice. See *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145, slip op. at 3 (2019). Such actions maintain the status quo of the past practice, and therefore they effect no change requiring that the union be given prior notice of the contemplated action and opportunity to bargain. See, e.g., *Raytheon*, supra, slip op. at 5. The party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Mike-Sell's Potato Chip Co.*, supra.[19] For example, the Board in *Raytheon* found that the employer there satisfied its burden of establishing a regular and consistent past practice by showing that it had taken the same action for 11 straight years. *Raytheon*, supra, slip op. at 17.

Applying *Raytheon* here, we find that the Respondent has failed to show that the temporary layoffs in February 2018 were consistent with a longstanding past practice. Prior to 2018, the Respondent's last temporary layoff occurred in 2009, and before that in 2001. The Respondent's use of temporary layoffs twice in 17 years falls well short of establishing a regular and consistent practice sufficient to privilege unilateral action. Further, the 2018 layoff was different in kind from the 2009 layoff because only shop (i.e. unit) employees were laid off in 2018, while the 2009 layoff involved both nonunit office and unit shop employees in equal numbers. Thus, prior to 2018, the last time

[16] The Respondent also argues that the Union "waived" its claim that the Respondent's delay violated Sec. 8(a)(3) and (1) when, in May 2018, the Union agreed to the Respondent's proposals at bargaining regarding wage increase amount and retroactivity. This argument lacks merit. The judge credited testimony that the parties agreed at that time to further bargaining on retroactivity. As noted, we find no basis for reversing the judge's credibility determinations.

[17] We adopt the judge's findings, for the reasons set forth by him, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally requiring employees to work mandatory overtime and by failing to provide the Union with requested information. We likewise adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to afford the Union an opportunity to bargain over providing annual performance reviews and accompanying wage increases to unit employees from about November 2017 through April 2018. In adopting the latter finding, we note that the Respondent did not except to the judge's finding that it had an established past practice of providing reviews and increases at the same time to unit and nonunit employees.

Member Emanuel, in adopting the 8(a)(5) violation regarding performance reviews and wage increases, does not rely on the judge's finding that the Respondent failed to give the Union timely notice and opportunity to bargain over wage increases.

[18] When "the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." 302 NLRB at 374.

[19] See *Raytheon,* 365 NLRB No. 161, slip op. at 16 ("[A]n employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past."); Id., slip op. at 19 fn. 89 ("[U]nder *Katz*, an employer modification that is consistent with any regular and consistent past pattern of change is not a change in working conditions at all.") (quotation marks omitted); *Mike-Sell's Potato Chip Co.*, supra, slip op. at 4 ("To establish the existence of a past practice, it is enough to show that frequent, recurrent, and similar *actions* have been taken[.]") (emphasis in original).

the Respondent temporarily laid off only the Respondent's shop employees was 17 years previously.[20] While a past-practice defense under *Raytheon* is not susceptible to mathematical specificity, the evidence adduced by the Respondent of two temporary layoffs in 17 years comes nowhere near meeting its burden of proving an established past practice that would have justified unilateral action. Cf. *Mike-Sell's Potato Chip Co.*, supra, slip op. at 3 (past practice established where employer sold 51 company driver routes between 1998 and 2016 even though, in several of those years, there were no sales).

We further find that the Respondent's conduct was not privileged by economic exigencies. The Respondent contends that it acted lawfully under *RBE Electronics*, which established that there may be economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, allow an employer to implement a change if it first gives notice to the union and bargains to impasse on the particular matter. *RBE Electronics*, 320 NLRB at 81. It argues that the layoffs were driven by economic exigencies because certain contracts were expiring at the time of the layoffs and thus the shop had insufficient billing to remain at full employment.

The Board has consistently maintained a narrow view of the economic exigency exception. As such, it has limited the *RBE* exception "only to those exigencies in which time is of the essence and which demand prompt action." Id. at 82. Thus, the Board "require[s] an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were 'compelled,' the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." Id. (footnotes omitted). The party asserting the exigency exception bears a "heavy burden." Id. at 81.

The Respondent has failed to meet this heavy burden. The Respondent does not assert that it was losing money or was otherwise in financial distress. It points to no contemporaneous pressure from creditors or compelling financial liabilities. Rather, the Respondent's dominant design and engineering division remained busy and was not subject to the layoffs. The Respondent's other revenue-generating operations likewise continued unabated during the shop layoffs. The Respondent's desire to save money in its shop operations,[21] however understandable, does not constitute an economic exigency where its economic health is not even asserted to be in question. An exigency is not shown where, as here, an employer is not threatened in any manner by straitened financial circumstances but simply seeks some monetary savings. See *Oak Hill*, 360 NLRB 359, 405 (2014) (collecting cases).

The Respondent has not, moreover, demonstrated that its economic condition necessitated prompt action. The Respondent acknowledges it operates in a cyclical business and does not dispute that it knew more than 5 months before the layoff of the expiring contracts for shop work. This long gap between the time when the Respondent first raised the issue of the layoffs and the time it implemented them refutes that the Respondent faced an economic exigency in which time was of the essence. See *Pleasantview Nursing*, 351 F.3d 747, 755–756 (6th Cir. 2003), enfg. 335 NLRB 961, 962 (2001). The issue was entirely foreseeable. The Respondent's desire for cost savings is certainly an appropriate topic for bargaining, but it does not constitute an economic exigency justifying piecemeal bargaining under *RBE Electronics*.

For all these reasons, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by temporarily laying off 10 shop employees.

2. The promotion of unit employees and the removal of bargaining unit work

Prior to the Union's certification in June 2017, the Respondent had two direct supervisors for the shop employees. Shortly after certification, one of the supervisors left the Respondent's employ. In late August, the Respondent posted openings for "three shop supervisors." On September 25, the Respondent promoted unit employees Donald Fess II, Americo Garcia, Jr., and Daniel Norway from their unit positions to the one vacated and two newly created supervisory positions.[22] Fess, Garcia, and Norway are "working" supervisors, and the record establishes that they perform unit work in their new positions. The Respondent did not hire any new shop employees to fill the vacated unit positions.

The Union requested bargaining over the newly created positions. The Respondent refused, asserting that it was privileged to act unilaterally because it had a past practice of shop supervisors performing shop work.

The judge found that the Respondent violated Section 8(a)(5) and (1) by removing unit work and transferring it to the three newly appointed supervisors. The judge found the violation under the "settled [rule] that an employer must notify and offer to bargain with a union about

[20] The Respondent's permanent layoff of 17 employees in 2015 is different in kind and degree than the temporary layoffs in 2018 and is not an appropriate comparator.

[21] The shop builds goods that constitute only between 3 percent and 5 percent of the goods sold by the Respondent by cost. The layoff of shop employees saved the Respondent between $60,000 and $70,000.

[22] No party excepts to the judge's finding that Fess, Garcia, and Norway are statutory supervisors in their new positions.

removal of bargaining unit work before it may assign such work to newly created supervisory positions." *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 (1998), enfd. mem. 182 F.3d 904 (3d Cir.1999). The Respondent does not dispute the rule. Rather, it excepts that the change in unit work here is de minimis and thus insufficient to constitute an unfair labor practice, and again raises a past practice defense under *Raytheon*.[23]

We find the Respondent's de minimis defense meritless. An employer's duty to bargain with the exclusive representative of its employees before making a change in wages, hours, or other working conditions arises only if the change is a material, substantial, and significant one affecting the terms and conditions of employment of bargaining unit employees. See, e.g., *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). The Respondent acknowledges that the three former unit employees, who are now statutory supervisors, still each perform unit work 22 percent of their work time, amounting to a loss of 1,372 manhours from the unit annually, which is more than 26 hours of unit work lost each week. This is plainly a significant loss of unit work and constitutes a material and substantial change requiring bargaining. Cf. *Ironton Publications*, 321 NLRB 1048, 1048 fn. 2, 1067 fn. 25 (1996) (23 minutes a week of unit work lost not a material change).

The Respondent's contention that the promotion of Fess, Garcia, and Norway from unit jobs to supervisory positions caused no harm because it did not diminish unit work is not supported by the evidence. For one thing, the foregoing evidence establishes that some work was removed from the unit by virtue of being performed by Supervisors Fess, Garcia, and Norway. Moreover, the Respondent does not dispute that it never filled the three vacated unit positions, nor does it contend that the work that did not follow Fess, Garcia, and Norway out of the unit has been permanently lost by the Respondent or redistributed in some fashion to remaining unit employees (e.g., by use of overtime). Rather, the Respondent's senior managers, Operations Director Richard Howe and Vice-President of Finance Joseph Bertozzi, and former Supervisor Kenneth Scheidel testified that they compensated for the loss of three-unit positions by adding nonunit temporary workers and by subcontracting. The record as a whole fully supports that the Respondent removed from the unit the work of three-unit positions.

We find meritless the Respondent's defense that its unilateral removal and transfer of unit work was privileged by its past practice of having supervisors perform some bargaining unit work. The issue is not whether the Respondent may continue a past practice of supervisors performing some unit work, but whether the Respondent, when it promoted the three shop employees to supervisory positions, effectively removed their work from the unit entirely and did not replace it. The Respondent has not shown any evidence of similar past conduct. The Respondent has failed to meet its burden of showing the significant criteria of similarity, regularity, and frequency set forth in *Raytheon* as requisite to establishing a past practice defense.[24]

We accordingly find that the Respondent has failed to establish that its unilateral elimination and transfer of unit work was consistent with an established past practice, and thus, we adopt the judge's finding that the Respondent by its conduct violated Section 8(a)(5) and (1) of the Act. See *Plymouth Locomotive Works, Inc.*, 261 NLRB 595, 602 (1982).

3. The imposition of discretionary discipline

The judge found that the Respondent exercised discretion in disciplining Dennis Bush for his involvement in the box incident and John Fricano for a safety infraction. In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board held that an employer has a duty to bargain before imposing discretionary discipline on unit employees when, as here, a union has been certified or lawfully recognized as the employees' representative but has not yet entered into a collective-bargaining agreement. Applying *Total Security Management*, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by imposing discretionary discipline on employees Bush and Fricano without giving the Union prior notice and an opportunity to bargain.

Subsequent to the judge's decision, the General Counsel joined the Respondent in requesting that the Board reconsider *Total Security Management* and dismiss the allegation. Recently, we overruled *Total Security Management* in *800 River Road Operating Company, LLC d/b/a Care-One at New Milford* and decided to apply that decision retroactively. 369 NLRB No. 109 (2020). Under *800 River Road*, an employer has no duty to give its unit employees' bargaining representative notice and opportunity to bargain prior to disciplining a unit employee in accordance with an established disciplinary policy or practice, including where application of that policy or practice involves the exercise of discretion. There is no allegation here that

[23] No party excepts to the judge's findings that the Respondent did not violate Sec. 8(a)(5) and (1) of the Act by promoting the three individuals to supervisory positions or granting them wage increases.

[24] Indeed, the Respondent's conduct here was not the product of a regular and consistent past practice, as *Raytheon* requires. Instead, it was the result of a brand-new reorganization the Respondent devised in August/September 2017 to restructure the shop along lines of physical space.

the Respondent did not apply established disciplinary rules when disciplining Bush and Fricano. Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) by failing to give the Union notice and opportunity to bargain before it disciplined Bush and Fricano.

ORDER

The National Labor Relations Board orders that the Respondent, Wendt Corporation, Cheektowaga, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies.

(b) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(c) Informing or implying to employees that employees who support Shopmen's Local Union No. 576 (the Union) will be laid off.

(d) Threatening employees with reprisals if they support the Union or any other labor organization.

(e) Threatening employees with unspecified reprisals for wearing union insignia.

(f) Implicitly promising employees a wage increase if they stop supporting the Union.

(g) Instructing employees to remove union insignia.

(h) Instructing employees to remove prounion photographs from social media.

(i) Denying employees' requests for union representation at interviews that they reasonably believe can result in discipline.

(j) Discriminating against employees for supporting the Union by delaying their performance reviews and wage increases, suspending them, assigning them to undesirable work, or denying them overtime.

(k) Unilaterally changing the terms and conditions of employment of its unit employees by laying them off, mandating overtime, removing unit work and transferring it to supervisors, or delaying their performance reviews and wage increases.

(l) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(m) Failing to recognize and bargain with the Union as the exclusive representative of employees in the bargaining unit by refusing to bargain regarding the retroactivity of pay increases conferred in 2018.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees who were not timely provided their performance evaluations and wage increases, those who were laid off, and Dennis Bush and William Hudson whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Compensate employees who were not timely provided their performance evaluations and wage increases, those who were laid off, and Dennis Bush and William Hudson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for these individuals.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Dennis Bush, and within 3 days thereafter notify him in writing that this has been done and that the suspension will not be used against him in any way.

(d) Within 14 days from the date of this Order, remove from Dmytro Rulov's 2018 performance review the language that he should focus on work, and within 3 days thereafter notify him in writing that this has been done.

(e) Rescind its unlawful unilateral removal of unit work and restore the status quo ante with respect to any reductions in the work performed by unit employees due to the unlawful employment of supervisors to perform unit work.

(f) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed by the Respondent at its facility located at 2555 Walden Avenue, Buffalo, New York 14225, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(g) On request, bargain with the Union regarding the retroactivity of pay increases conferred in 2018.

(h) Furnish to the Union in a timely manner the information requested by the Union since on about May 24, 2018, regarding the dates of performance reviews and wage increases to nonunit employees.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its facility in Cheektowaga, New York, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT give you the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT inform you or imply to you that employees who support Shopmen's Local Union No. 576 (the Union) will be laid off.

WE WILL NOT threaten you with reprisals if you support or show support for the Union or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals for wearing union insignia.

WE WILL NOT implicitly promise you a wage increase if you stop supporting the Union.

WE WILL NOT instruct you to remove union insignia.

[25] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT instruct you to remove prounion photographs from social media.

WE WILL NOT deny your requests for union representation at interviews that you reasonably believe can result in discipline.

WE WILL NOT discriminate against you for supporting the Union by delaying your performance reviews and wage increases, suspending you, assigning you to undesirable work, or denying you overtime.

WE WILL NOT change your terms and conditions of employment by laying you off, delaying your performance reviews and wage increases, mandating overtime, or removing unit work and transferring it to supervisors, or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT fail to bargain with the Union as the exclusive representative of our employees in the bargaining unit by refusing to bargain regarding the retroactivity of pay increases conferred in 2018.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make employees who were laid off whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Dennis Bush, William Hudson, and employees who were not timely provided their performance evaluations and wage increases whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest.

WE WILL compensate employees who were not timely provided their performance evaluations and wage increases, those who were laid off, and Dennis Bush and William Hudson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for these individuals.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Dennis Bush, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from Dmytro Rulov's 2018 evaluation the language that he should focus on work, and WE WILL, within 3 days thereafter, notify him in writing that this has been done.

WE WILL rescind our unlawful unilateral removal of unit work and restore the status quo ante with respect to any reductions in the work performed by unit employees due to the unlawful employment of supervisors to perform unit work.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed by the Respondent at its facility located at 2555 Walden Avenue, Buffalo, New York 14225, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union regarding the retroactivity of pay increases conferred in 2018.

WE WILL provide the Union with the information that it requested since on about May 24, 2018, regarding the dates of performance reviews and wage increases to nonunit employees.

WENDT CORPORATION

The Board's decision can be found at www.nlrb.gov/case/03-CA-212225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Jessica Noto and *Jesse Feuerstein, Esqs.,* for the General Counsel.
Ginger Schroder and *Alice Rood, Esqs. (Schroder Joseph & Associates),* for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on an August 22, 2018 consolidated complaint and notice of hearing (the complaint) stemming from an unfair labor practice charges that Shopmen's Local Union No. 576 (the Union) filed against Wendt Corporation (the Respondent or the Company), alleging violations of Sections 8(a)(1), (3), and (5) of the Act, following the Union's certification in June 2017.

I conducted a trial in Buffalo, New York, on September 10–14 and November 5–7, 2018, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

ISSUES

Based on the unopposed motions to amend the complaint that the General Counsel made at trial, the issues before me are:[1]

(1) Did Plant Manager Daniel Voigt (Voigt) violate Section 8(a)(1) by:

(a) In about September 2017, interrogating Dale Thompson (Thompson) about his support for the Union by asking whether Thompson would change his vote if a new election was held.

(b) On about January 25, 2018, creating the impression of surveillance by informing Thompson that the Respondent could observe all of employees' Facebook activities regardless of whether they chose to block or limit access to their Facebook pages.

(c) On the same date, threatening Thompson with unspecified reprisals for wearing a t-shirt that contained a pro-union message and union logo.

(d) On that same date, creating the impression of surveillance by informing Thompson that the Respondent had cameras covering the exterior of the facility and that these cameras could see any activity occurring outside the facility.

(e) On that same date, implying that Thompson would receive a wage increase if he ceased support for the Union

(f) On that same date, informing Thompson that employees who supported the Union would be selected for layoff.

(g) On that same date, threatening Thompson with unspecified reprisals by implying that he should not support the Union because he had a family to support.

(h) On about January 10, 2018, impliedly instructing Jeff George (George) to remove a t-shirt that displaced union insignia.

(i) On that same date, informing George that pro-union employees were targeted for a future layoff.

(j) On about January 24, 2018, creating the impression of surveillance by informing George that the Respondent had seen a pro-union photograph posted on George's Facebook page.

(k) On that same date, instructing George to remove a prounion photograph from George's Facebook page.

(l) On about January 25, interrogating George about his union activities and sympathies by asking George about his conversations with other union members.

(m) On about April 10, 2018, threatening Dmytro Rulov (Rulov) with unspecified reprisals for supporting the Union

(n) Did the Respondent, on that same date, violate Section 8(a)(1) by implying in Rulov's written performance review that he should focus on work rather than on union activity.

(2) Did the Respondent violate (a) Section 8(a)(3) and (1) by suspending Dennis Bush (Bush) on December 27, 2017, for alleged violation of the Company's policy against harassment; and (b) Section 8(a)(5) and (1) by exercising discretion in imposing the discipline, without affording the Union notice and an opportunity to bargain.

(3) Did the Respondent violate Section 8(a)(3) and (1) by (a) assigning William Hudson (Hudson) to work the saw from April through June 2018, after he came back from layoff; and (b) refusing to offer him overtime during that period.

(4) Did the Respondent violate (a) Section 8(a)(1) on October 25, 2017, by conducting an interview with John Fricano (Fricano) after Voigt denied Fricano's request to be represented by the Union, when Fricano had reasonable cause to believe that such interview would result in disciplinary action against him; and (b) Section 8(a)(5) and (1) by exercising discretion in imposing a suspension on Fricano, without affording the Union notice and an opportunity to bargain.

(5) Did the Respondent violate Section 8(a)((3), (5), and (1) on February 8, 2018, by laying off 10 bargaining unit employees, for discriminatory reasons and without affording the Union an opportunity to bargain.

(6) Did the Respondent violate (a) Section 8(a)(3) and (1) by failing to provide annual performance reviews and accompanying wage increases to bargaining unit employees from about October 2017 through April 2018; and (b) Section 8(a)(5) and (1) by failing to afford the Union an opportunity to bargain.

(7) Did the Respondent violate Section 8(a)(5) and (1) since on about May 24, 2018, by failing and refusing to furnish the Union with information that it requested regarding the date(s) of wage increase for its nonunit employees.

(8) Did the Respondent violate Section 8(a)(5) and (1) on September 25, 2017, by removing Donald Fess II (Fess), Americo Garcia, Jr. ("Junior") (Garcia), and Daniel Norway (Norway) from the bargaining unit by promoting them to supervisory positions, without the Union's consent.

[1] As per the Board's November 13, 2018 Order (2018 WL 5964286), I deny the General Counsel's opposed motion to amend the complaint to add the allegation that the Respondent violated Section 8(a)(1) through its counsel's cross-examination of Derek Muench, without prejudice to the General Counsel's right to litigate the issue in a separate proceeding.

(9) Did the Respondent on about that same date violate Section 8(a)(5) and (1) by unilaterally removing bargaining work from the unit and transferring it to those supervisors, without affording the Union prior notice and an opportunity to bargain.
(10) Did the Respondent violate Section 8(a)(5) and (1) in January 2018, by granting wage increases to Fess, Garcia, and Norway without affording the Union notice and an opportunity to bargain.
(11) Did the Respondent violate Section 8(a)(5) and (1) on about January 29, 2018, by changing its policy concerning light duty work assignments when it placed Garcia on light duty, without affording the Union notice and an opportunity to bargain.
(12) Did the Respondent violate Section 8(a)(5) and (1) in about late November 2017, by changing its overtime policy to require the two shipping and receiving clerks to work mandatory overtime, without affording the Union notice and an opportunity to bargain.

Witnesses and Credibility

The General Counsel called:

Union administrator Anthony Rosaci (Rosaci);
Former Shop Foreman Kenneth Scheidel (Scheidel);
Former Leadman Harley Kenney (Kenney);
Current unit employees: Bush, Fricano, George, Hudson Rulov, Robert Domaradski ("Demo") (Domaradski), Zachary Krajewski, Sean McCarthy (McCarthy), Derek Muench (Muench); and
Former unit employee David Greiner (Greiner).

The Respondent's witnesses were:

Vice-President of Finance Joseph Bertozzi (Bertozzi);
Supply Chain Manager Michael Dates (Dates);
Operations Director Richard Howe (Howe);[2]
Warehouse Supervisor Michael Hoerner (Hoerner);
Shop Supervisors Fess, Garcia, and Norway; and
Former Plant Manager Steven Jastrzab (Jastrzab).

On certain matters, the testimony of witnesses for the General Counsel and witnesses for the Respondent was consistent, considering the natural lack of precision in recall. Where credibility resolution is important, I have taken into account several established principles:

Firstly, a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

Secondly, "[T]he testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied for other reasons, 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill,* 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972).

Thirdly, an administrative law judge normally has the discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). See also *Interstate Circuit v. U.S.*, 306 U.S. 208, 225–226 (1939).

Here, the Respondent offered no explanation for why Plant Manager Voigt was not available as a witness. Accordingly, the Respondent's failure to call him leads to an adverse inference that his testimony would have been unfavorable to the Respondent, and I credit the unrebutted and credible accounts of witnesses who testified about incidents in which he participated. I draw a similar adverse inference for the Respondent's not calling Human Resources (HR) Coordinator Janet Semsel (Semsel), an admitted agent, to testify about HR practices and policies and about disciplinary interviews that she attended.

Similarly, to the extent that management witnesses were not questioned about certain events to which General Counsel's witnesses testified, I draw an adverse inference since, as management representatives, they reasonably would be assumed to be favorably disposed to the Respondent. See *Daikichi Corp.*, 335 NLRB 622, 622 (2001); *Colorflow Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1288 (9th Cir. 1978).

Finally, I note that when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. 1 at fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

I will discuss the credibility of witnesses on particular matters during my recitation of the facts. At this point, I will address the

[2] On the various organizational charts (R. Exhs. 9, 9(a)), Bertozzi, Dates, and Howe are on the same level in the Company's management hierarchy, directly reporting to President Tom Wendt Jr.

overall credibility of former Foreman Scheidel, who testified on the General Counsel's behalf. The Respondent contends that his testimony should be discredited in its entirety (R. Br. at 21–22). Scheidel was laid off on February 9, 2018, and terminated on March 14, 2018 (see R. Exh. 3), after being a foreman for about 13-1/2 years, with two breaks in employment. Scheidel has filed an age discrimination against the Respondent with the New York State Division of Human Rights (ibid). Although these circumstances can be considered as providing him a motive to testify against the Company, and he indeed might naturally have some animosity, Scheidel testified freely and in considerable detail throughout his testimony, both on direct and cross-examination, and neither his testimony nor his demeanor suggested any attempt to slant his answers to hurt the Respondent. Indeed, at times he volunteered information that supported some of the Respondent's positions; for example, concerning "working foreman" Stephen Quarcini (Quarcini). In light of these conclusions and his many years of serving as a management official, I find that his testimony was reliable.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the thoughtful posttrial briefs that the

General Counsel and the Respondent filed. I find the following.

Background

At all times material, the Respondent has been a corporation with an office and place of business in Cheektowaga, New York (the facility), where it designs, develops, and manufactures products and processes for the scrap metal recycling industry throughout North America. Jurisdiction as alleged in the complaint is admitted, and I so find.

The facility includes about 110,000 square feet of working space in the 5 bays where unit employees work in conjunction to complete projects (see R. Exh. 10, a schemata). Formerly, the manufacturing now done at the facility was performed at the Respondent's facility on Military Road in Cheektowaga that now serves as a small processing plant or technical service center.

About 100 people work at the facility. On June 23, 2017, the Regional Director certified the Union as the exclusive collective-bargaining representative of all full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, and shipping and receiving clerks employed at the facility, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act. The voter eligibility list for the election (Jt. Exh. 1) listed 33 employees. At particular times, all have reported to the same supervisors/managers except for the shipping and receiving clerks (see R. Exhs. 9 and 9(a), organizational charts).

At the time of certification, the Union contended that the three leadmen should be in the unit, whereas the Respondent took a contrary position. Because their ballots were not determinative of the election results, the Regional Director neither included them nor excluded them from the certified unit. However, the Company later agreed to their inclusion (see GC Exh. 25, a memorandum of agreement of September 22, 2017), and the parties at trial so stipulated.

The parties first met for negotiations in July 2017 and thereafter met approximately 36 times. They have not reached agreement on a contract, but no impasse has been declared, and they continue to meet. Attorney Ginger Schroder (Schroder) has been the Company's chief spokesperson, with Rosaci serving as the Union's chief spokesperson. Other members of the Company attending bargaining have been Bertozzi, Dates, and Howe. Employees on the Union's bargaining committee have been Domaradski, Fricano, Greiner, Hudson, and Noel Pauley (Pauley).

General Counsel's Exhibit 3 includes photos of Wendt employees showing support for the Union that the Union sent by certified mail to the Respondent. The parties stipulated that the certified mail receipt, signed by Semsel, reads January 29, 2018. Rosaci identified 17 employees in three photographs, including Bush and Hudson. Howe testified that he was aware that active union supporters included Bush, Domaradski, Fricano, George, Greiner, Hudson, Krajewski, Muench, Thompson, and six or seven other unit employees. On an ongoing basis, employees have engaged in picketing outside the facility on nonwork hours.

8(a)(1) Statements

As I stated earlier, Voigt did not testify, and I draw an adverse inference based on his failure to deny or otherwise testify as to statements that George, Rulov, and Thompson attributed to him. Furthermore, all of them testified with appropriate detail and did not appear to try to exaggerate what Voigt told them, and I do not believe that they concertedly fabricated their accounts. I therefore credit them. I note that George's testimony was substantially corroborated by notes that he took of his conversations with Voigt (GC Exh. 41, based on notes that he wrote down on a pad within an hour of the conversations and then transferred to his phone). I also note that statements Rulov made in his affidavit were substantially consistent with his testimony and corroborated it in substance rather than impeached him. In crediting Rulov, I take into account that his first language is Russian.

A. To Thompson

On an afternoon in September 2017, Thompson was in eFab when Voigt came over and asked how he was liking it. Thompson replied that it was something different, and he did. Voigt then asked if there was a re-vote, would Thompson change his mind. Thompson made mention of the company firing many of his friends and coworkers, and Voigt stated, "There's[sic] a lot of bad employees here, and I'd like to get rid of them in the shop, and also one in the office as well."[3]

On a morning in January 2018, Thompson was again in eFab when Voigt approached. Approximately a day earlier, Thompson had blocked Voigt on his Facebook. Voigt stated that he did not care that Thompson had blocked him on Facebook because Thompson was liking the Union but that Voigt could create a fake profile and see whatever Thompson was viewing or liking. He further stated that there were "two people up in the office" who "could see everything that we're doing on the internet."[4]

Voigt returned about half an hour later. He stated that he

[3] Tr. 347.

[4] Tr. 348.

really liked Thompson and had a good opinion of him and did not want to see him get laid off and that Thompson had young kids. Voigt further stated that the Company was going to lay off people who were with the Union. Thompson said that he was loyal to his friends and to the Company and that he did not think the layoffs were right. Voigt further said that there were cameras outside that could zoom in and see everything. He mentioned that they had zoomed in on Fess' shirt and could read what was on it and could see the color of somebody's underwear if he was bent over.

B. To George

On January 10, 2018, George was at work wearing a union t-shirt that was visible under his Company button-up work shirt, which was not buttoned up all the way. He had two conversations with Voigt that morning at the north end of the paint shop. In the first, Voigt approached and asked what George was doing with the union shirt on. George responded that it was given to him, and Voigt responded, "Well, I'd take that off if I was[sic] you. That's how guys get into trouble around here."[5] He then suggested that George button up his work shirt and not let anybody else see the t-shirt.

Within 1–1-1/2 hours, George called Voigt over and said that Voigt's earlier comments had made him nervous because he had family and could not afford to lose his job over the Union. Voigt assured him that he was safe because the Company had a list of shop employees that the Company could not afford to lose. George asked how he could be safe when the Company had to lay off by seniority. Voigt replied that they would absolutely not lay off by seniority and had ways around it. In this conversation, George asked Voigt if the Company was busy. Voigt responded, "Yes, we have plenty of work, don't worry, you know, we're busy."[6] George then said, "Oh, so it's only by design that we're slow?," and Voigt replied "Yeah, we're just taking it in the ass until all this goes away."[7] He further stated that once the Company started to ramp up again, they would bring in all new people.

On January 22, George changed his Facebook profile, to include a shirt with a prounion logo (see GC Exh. 42, an accurate snapshot of the changed profile). On the morning of January 24, George was working in the welding shop. Voigt approached and said, "Some of the office personnel and I see you have a new Facebook picture."[8] George asked, "What are you guys doing, spying on me?," and Voigt then said, "I'd take that down if I was [sic] you."[9] He further stated that George would probably get in less trouble "wearing the stupid shirt" than putting it on the internet.[10] Within a few days later, George changed his profile name, taking out his last name and replacing it with his middle name, because he did not want anyone spying on him (see GC Exh. 42). Around the same time, he changed his profile from public to private.

On the morning of January 25, George was working in the paint shop area when Voigt approached and asked if there was anything George needed to tell him about the meeting last night. George responded that there was no meeting. Voigt said no, the negotiations meeting, and he asked if Domaradski or any of the other attendees had said anything him to him about layoffs or anything. George replied that he really did not know because he was not on the bargaining committee. Voigt responded that if he heard anything that he thought Voight should know, to tell him, and Voigt would be a good friend and do the same for him.

C. To Rulov

On the afternoon of April 10, 2018, in a conference room, Voigt presented Rulov with his annual review. Supervisor Garcia was also present. During the process of signing the review, Voigt pointed with a pen to Rulov's left shoulder and said Rulov should work more overtime, concentrate on the job, and forget about any outside source or words to that effect. Rulov pointed to the union pin on his left shoulder (see GC Exh. 44) and said, "[Y]ou mean, this?" and Voigt said yes.[11] The comments section of the evaluation (GC Exh. 43 at 4) reads: "Dymytro has been with Wendt for a long time and has a large variety of skills. He is the kind of person who knows the task at hand and does it. He is a steady force in the manufacturing of our products. Dmytro needs to focus more on the job at hand and worry less about non work related activities."

Analysis and Conclusions

The Respondent is liable for any threats or other statements that Voigt made because he was its supervisor. The Board has long recognized that "Section 2(13) of the statute makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not." *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987); see also *Storer Communications*, 294 NLRB 1056, 1077 (1989); *Jays Foods, Inc.*, 228 NLRB 423 (1977), enfd. on this point 573 F.2d 438, 445 (7th Cir. 1978).

The standard for determining whether a supervisor's statement to employees violates Section 8(a)(1) of the Act is whether such statements would reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The test is whether a supervisor's statement would reasonably coerce the employee to whom it is made. *Egelhand Corp.*, 342 NLRB 46, 60–61 (2004), enfd. 437 F.3d 374 (3d Cir. 2006).

I conclude the following, based on the employees' unrefuted testimony:

(a) Voigt asked Thompson in September 2017 whether he would vote differently if there was a new election. In evaluating the interrogation of known union supporters, the Board uses a totality of circumstances approach for determining unlawful coerciveness, applying a four-pronged test: (1) background; (2) nature of the information sought; (3) identify of the questioners; and (4) the place and method of interrogation. *Rossmore House*, 269 NLRB 1176, 1177, 1178 fn. 20 (1984), enfd. sub nom. *Hotel*

[5] Tr. 270.

[6] Tr. 272.

[7] Ibid. According to George's notes, Voigt specifically tied this statement to the Company's "attempt to get rid of the union." GC Exh. 41 at 5.

[8] Tr. 281. George and Voigt were not Facebook "friends."

[9] Ibid.

[10] Ibid.

[11] Tr. 405. Garcia did not testify about the meeting and therefore did not rebut Rulov's account.

Employees and Restaurant Employees Union, Local 11, 760 F.2d 1006 (9th Cir. 1985). Significantly, Plant Manager Voigt was a management official who had authority over the first-level supervisors and reported directly to Director Howe, and he initiated the conversation. Moreover, during the conversation, Voigt stated that he wanted to get rid of a lot of bad shop employees, suggesting a link between his question and termination of union supporters. Accordingly, Voigt engaged in unlawful interrogation.

(b) Voigt informed Thompson in January 2018, that although Voigt did not care if Thompson had blocked him on Facebook because Thompson liked the Union, Voigt and people in the office could still see whatever Thompson was viewing and liking on Facebook. The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether under all of the circumstances, reasonable employees would assume that their union activities had been placed under surveillance. *Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. at 1 (2018), citing *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633 (2011), enfd. sub nom. *Matthew Enterprises, Inc., v. NLRB*, 498 Fed Appx. 45 (DC Cir. 2012). Thompson reasonably could have assumed such, and Voigt therefore unlawfully created the impression of surveillance of Thompson's union activities.

(c) Voigt, on that same date, unlawfully created the impression of surveillance by informing Thompson that the Company had cameras outside that could zoom in and see everything, including what was on employees' shirts (Thompson was wearing a union t-shirt at the time). See the above cases.

(d) Voigt, in the same conversation, violated Section 8(a)(1) when he informed Thompson that employees who supported the Union would be laid off.

(e) Voigt, in that same conversation, violated Section 8(a)(1) when he implicitly threatened Thompson with reprisals if he supported the Union by telling him the above and referring to Thompson's children. See *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010), holding that an employer's communication to employees that they will jeopardize their job security, wages, or other working conditions if they support the union violates Section 8(a)((1). See also *Kellwood Co.*, 299 NLRB 1026, 1026–1027 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991).

(f) The allegation that Voigt threatened Thompson in that conversation with unspecified reprisals for wearing a t-shirt that contained a prounion message and union logo is subsumed by the violations found in (c) and (e) above and is redundant. This allegation is therefore dismissed.

(g) Thompson's testimony does not support the allegation that Voigt in that conversation implied that Thompson would receive a wage increase if he ceased support for the Union. Therefore, this allegation is also dismissed.

(h) Voigt, on about January 10, 2018, unlawfully threatened George with retaliation for wearing a prounion T-shirt by telling him that wearing such shirts got employees into trouble.

I find a violation on this basis rather than on the complaint allegation that Voigt impliedly instructed George (George) to remove a t-shirt that displaced union insignia.

(i) Voigt, later that day, violated Section 8(a)(1) when he implied to George that prounion employees were going to be targeted for a future layoff by stating that the Company was busy but was contending to the contrary "until all this goes away," in order to replace them.

(j) Voigt, on about January 24, 2018, unlawfully created the impression of surveillance by informing George that the Respondent had seen a prounion photograph posted on George's Facebook page.

(k) Voigt, in the same conversation, unlawfully threatened George with retaliation for having that prounion photograph on his Facebook page by stating that it could get George into trouble.

I find a violation on this basis rather than on the complaint allegation that Voigt instructed George to remove the photograph.

(l) George's testimony revealed that on about January 25, 2018, Voigt asked him if he had heard from employees on the Union's bargaining team what was said at negotiations the previous evening, including the subject of layoffs. The General Counsel alleges that this constituted interrogation about George's union activities and sympathies. I recognize that Voigt had no reason to question George about what was said at negotiations because he could have obtained such information from company representatives who were present. However, Voigt was not asking for anything that went to employees' internal union activities and sympathies, and what the parties said at negotiations was open knowledge and not confidential. Accordingly, I do not believe that Voigt's question was coercive and find no violation.

(m) Voigt, on about April 10, 2018, when giving Rulov his annual performance review, unlawfully implicitly threatened Rulov with unspecified reprisals for supporting the Union by pointing to the union pin that Rulov was wearing and stating that Rulov should concentrate on his job and forget about any outside source.

(n) The General Counsel alleges that on same date, the Respondent violated Section 8(a)(1), by implying in Rulov's written performance review that he should focus on work rather than on union activity, thereby implicitly threatening him with unspecified reprisals for supporting the Union.

In this regard, the comments section of the evaluation is paradoxical, first lauding Rulov's performance but ending with "Dmytro needs to focus more on the job at hand and worry less about non work related activities." In the absence of an explanation for this inconsistency, and in light of Voigt's comments during the interview, I sustain this allegation.

Bush's Suspension—8(a)(3) and (5)

The Company has employed Bush for about 6-1/2 years, as a welder for approximately the last three. Bush has attended union rallies, and at work worn a union button and a long-sleeve shirt with the union log. He also has stickers saying "Local 576" on his welding helmets and union stickers on the back of his jeep. About a month after the election, he was in bay 5 in the morning when Foreman Scheidel asked what he was doing wearing the union colors on his shirt. Bush replied that he was supporting his fellow union brothers. Scheidel knew of Bush's open support

of the Union, and Howe conceded the Company had such knowledge.

The Company's employee manual (GC Exh. 23 at 8–9) contains an anti-harassment policy stating a zero tolerance policy against discrimination or harassment based on, inter alia, national origin or sexual orientation. Harassing conduct includes, inter alia, slurs or denigrating jokes. Any reported allegations of such conduct "will be investigated promptly, thoroughly and impartially. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge [sic]."

The shipping and receiving department takes product out of heavy-duty boxes or crates; some are from a German company and have "F.A.G." in black letters on their sides. After they are emptied, the boxes are stored outside shipping/receiving. Many employees, including Domaradski, use these empty boxes for wood trimmings that they put in a box under their tables, for use in performing their work.

On December 21, 2017, Bush wore a long-sleeved union shirt at work. At about 1:45 p.m., he welded a conveyer in bay 5. He was aware that Domaradski was looking for a box for wood pieces. The only one empty sturdy, heavy-duty box in his area was a F.A.G. box. Bush put it on the conveyor, which he then "craned" to the other end of the aisle.

Voigt was in his office and looked up at him. Bush held up the box and laughed. Voigt snickered. Bush walked over to Domaradski's area and set the box down and said jokingly, "Here's your box."[12] Both he and Domaradski laughed, and he then left. Bush did not see employee Joe Kraebel (Kraebel), but Domaradski testified that he was in the general area. Bush testified that he was in a great mood that day and laughing casually. I note that Bush displayed an exuberant and colorful personality as he testified.

On the afternoon of December 27, Bush was informed that Semsel of HR wanted to see him, and he met with her and Denise Williams, also of HR, in the conference room. They brought up the December 21 incident and what the box said. Bush confirmed that it had "F.A.G." on the sides, and Williams stated that someone could be offended. Bush asked if she was kidding, and she said no. Bush explained that the box came from shipping and receiving and that employees used them in their work areas because they were nice and heavy-duty. Semsel stated that he was getting a 3-day suspension (without pay) for the incident and to leave at 2 p.m.

General Counsel's Exh. 22 is the final written warning and 3-day suspension that Bush received, for a "direct violation of Wendt's Non-Harassment Policy." The narrative states that "On 12/21/17, Dennis Bush held up a shipping box that was from a company named Fag, approached the Plant Supervisor, Dan Voigt, and pointed to the box and to his co-worker and said, 'Look what I have. It's Rob's tool box' [sic] Dennis then placed the shipping box on his co-workers work station. . . ."

The morning that Bush returned from the suspension, Voight came to Bush's area in bay 5. Bush told him that the box incident was water under the bridge, to which Voigt responded, "[I]t has nothing to do with me. I didn't do it, you know? He goes on it was somebody else."[13]

Bush testified that Domaradski was present during that conversation, but Domaradski did not testify about it. However, I credit Bush's account in the absence of a denial from Voigt. I note that Bush's overall credibility was not undermined by the discrepancy in his testimony on cross-examination that he had received a coaching from Scheidel in the first 6 months of his employment, and the statement in one of his affidavits that he had no prior disciplines before the suspension. In this regard, Bush testified that the coaching was verbal talking to, that he received nothing in writing, and that he believed it occurred during his 90-day probation period. I also note Bush's volunteering on cross-examination that during his employment, "I've had a perfect everything with [the] company,"[14] contraindicative of any intention to skew his testimony against the Respondent.

Domaradski testified that he found the word (F.A.G.) humorous but not offensive. He never complained about the incident and was never interviewed about it. Domaradski still has the box under his bench, with the letters F.A.G. facing out and visible to people walking by. At no time has the Company issued any kind of instruction or directive to employees regarding use of the F.A.G. boxes.

Bertozzi testified that it was explained to him that, holding the box, Bush had yelled to Voigt, "[H]ey look, it's Demo's toolbox, and just laughed."[15] Bertozzi further testified that Voigt and Kraebel had brought it to management's attention, and that he made the decision to suspend Bush. Neither Semsel nor Williams testified, Voigt told Bush that he was not behind the suspension, and the Respondent submitted no documentation showing any investigation or written records of any complaints.

Bertozzi averred that the suspension of Bush was consistent with discipline meted out to other employees for violation of the anti-harassment policy. Thus, in May 2016, Domaradski received a 3-day suspension for, on two occasions, using an ethnic slur ("gooks" and "chigger") toward an Asian-American coworker in the presence of that coworker and other employees (R. Exh. 35). And, on December 1, 2017, Kraebel received a 3-day suspension for calling Domaradski a "polack" (R. Exh. 36). Although documentation of the incident is not in the record, Garcia testified that he recommended a written write-up for Rulov for making a gesture that was taken the wrong way by a coworker, who felt it was an offensive physical contact.

General Counsel's Exhibit 62 is a coaching note issued in March 2017 to Pauley, for disrespectful behavior toward a coworker: "Noel told his co-worker what to do with the garbage and 'kicked' it in his co-workers[sic] direction." General Counsel's Exhibit 63 is a coaching note (verbal warning) issued in December 2017 to Kevin Moore for becoming aggressive and threatening to "kick another co-workers[sic] ass."

I will later address the allegations that the Respondent violated Section 8(a)(5) by exercising discretion in disciplining Bush and Fricano, without affording the Union notice and an opportunity to bargain over the exercise of that discretion.

[12] Tr. 859 (Bush), 803 (Domaradski).
[13] Tr. 872.
[14] Tr. 880.
[15] Tr. 1672.

Hudson's Assignment and Denial of Overtime—8(a)(3)

The Company has employed Hudson as a welder since December 2011. Hudson was the Union's initial contact in the organizing drive and played a large role therein.[16] He served as the Union's observer at the election. Along with Domaradski and Greiner, he has been on the Union's negotiating committee, and he has attended almost all of the bargaining sessions. He has openly supported the Union at work by wearing daily various shirts with union insignia and union buttons, and he has regularly participated in picketing outside the facility. Foreman Scheidel knew of Hudson's open support for the Union, and Director Howe conceded at trial Company knowledge of this.

I note former Leadman Kenny's unrebutted testimony that in late April or early May 2017, Foreman Quieri came by with a sheet indicating which employees should attend one of the three company meetings concerning unionization. When Quieri informed Kenny, Kenny saw that the sheet had certain names in boldface, including his, Hudson's, and Domaradski's. Kenny asked why his name was in bold, and Quieri replied, "Well, because you're a union initiator."[17]

Prior to the February 8, 2018 layoffs, Hudson performed welding. A certified welder, he had a reputation for being one of the best welders, as Bush, Domaradski, Kenney, Krajewski, and Thompson testified;[18] and Sheidel, who supervised Hudson for most of his tenure with the Company, considered him an "outstanding" welder.[19] When Howe was asked about Hudson's performance as a welder, he agreed that Hudson was one of the most talented welders but that he was not the most productive, adding that Hudson was "often distracted …,"[20] without explaining what he meant.

Before the layoffs, Charles Braswell (Braswell) was the fulltime saw person, operating the large or band saw for cutting heavier-gauge steel, and a smaller saw (the cold saw) (jointly called "the saw"). He was assisted by temps. After he was laid off, Thompson, a welder/fitter, mainly ran the saw; Rob Showler operated the main saw on a couple of days. Hudson, Kenney, Krajewsk, and Scheidel, all testified that operating the saw is not skilled work, with Kenny considering it the "lowest job."[21] Consistent with their testimony, Garcia testified that training for the big saw is "not that involved" and primarily consists of knowing how to read a tape measure.[22] In this regard, Foreman Scheidel assigned less experienced and lower skilled welders to run the saws when he needed someone to operate them.

Braswell did not return from layoff. Thompson returned to welding/fitting upon his recall. When Hudson was called back and reported to work on April 6, Supervisor Garcia told him that he would be working in bay 1 under Supervisor Norway. Hudson responded that he had always worked in bay 5 and asked why he was going there. Garcia did not give him a direct response. When Hudson reported to Norway, he asked what he would be doing, and Norway replied the saw. Hudson responded that was ironic because he had gotten a zero rating on the saw. Norway replied that they all knew that he could work the saw. Hudson considered this assignment a punishment because the saw was an easy job not requiring skill. He had operated the bandsaw only two or three times for 20–30 minutes each within the first year of his employment but never thereafter.

Hudson's reference to a zero rating on the saw referred to ratings that the Company assigned to various employees per category of work when it was proposing to lay off employees based on their skills and abilities (see R. Exh. 6).[23] In each of 16 operations in the shop, employees received a rating of 5 if they were deemed capable of performing the work without any training, a rating of 3 if they required only a reasonably brief period of training, and a rating of 0 if they needed a week or more of reasonable training. Hudson received a zero rating in all 15 work classifications other than weld b, including, inter alia, saw, machining, weld a, assembly, assembly eFab, material, and paint. At negotiations, Hudson expressed displeasure at his ratings. I note that Howe testified in an equanimous manner throughout his long testimony, with the exception of showing irritation in his voice and manner when he testified about Hudson's protest over his ratings.

Welder Bush has never had to work the saw, and he testified that no fulltime welder other than Hudson has been assigned to work them for an extended period. Bush testified about a conversation with Norway shortly after his recall from layoff, in Bush's new work area in bay 1. Bush asked why Hudson was on the saw. Norway replied that Gino (last name unknown), the floating temp, did not know how to use the saw so they would just keep Hudson on it. However, Domaradski testified that after Hudson was injured in July while operating the saw, Gino ran the saw as well as welded. Norway did not rebut Bush's and Domaradski's testimony, and I credit them.

Originally, either Garcia or Norway told Hudson that he would be on the saw for 2 weeks, but he ended up on it until August 13 (see GC Exh. 64, Hudson's labor detail reports).

During this period, Bush, Domaradski, Gino, Krajewski, and Scott Rammacher all performed welding.

Garcia testified that he, Fess, and Norway discussed with Voigt the placement of employees after they returned from layoff, to maximize efficiency and to afford some employees an opportunity to expand their skill sets and be more versatile. These included Bush, who went from a conveyor welder to a fitter/welder; Krajewski, who was given an opportunity to work in paint; Mario Rojas, who moved from doing welding in building 1 to do welding on larger structures in building 5; Rulov, who went from a fitter to a finder-fitter; and Hudson. Garcia was aware that Bush and Rojas had requested such changes in their assignments. Other than Hudson, all of them continued to perform at least some welding work after they were recalled. Garcia testified that he advocated putting Hudson on the saw because

[16] Krawjeski testified (at Tr. 669) that Hudson was nicknamed "The President" because he organized most of the employees.

[17] Tr. 180.

[18] Domaradski and Krajewski testified that Hudson's nickname is "Golden Rod." Tr. 808, 675.

[19] Tr. 532.

[20] Tr. 1237.

[21] Tr. 229.

[22] Tr. 1414.

[23] Howe testified that he rated Hudson a zero because he had "never operated the saw in a production manner." Tr. 1215.

Hudson had experience in welding and assembling, but he had not personally seen Hudson work on the saw.[24]

I credit the follow unrebutted testimony of witnesses for the General Counsel. When Hudson returned from the layoff he was aware that all other welders and fitters were working overtime and he asked Norway if he could also work overtime. Norway replied that he had not been approved yet for Hudson to work overtime. Hudson asked Norway again for overtime during the first couple of weeks that he was back and received the same response. Overtime was offered to welders after the recalls from layoff. A couple of months after the recall, Thompson was assigned to work the cold saw for a couple of days, while Hudson operated the main saw. Thompson was permitted to work overtime on those occasions.

Fricano's Suspension—8(a)(1) and (5)

Fricano has been a paint finisher for the Company for over 7 years. On October 23, 2017, he was assigned to paint a finder bed. He and the whole paint crew put it on a forklift and pulled it into the paint booth. Fricano was preparing to paint with the forklift inside when, at Voigt's request, Howe came to the paint booth. He asked Fricano what he was doing and if he felt that painting with the fork truck inside was safe, "And [Fricano's] eyes doubled in size as he glared at me and immediately began to accuse other people of telling him to do it."[25] Fricano agreed it was unsafe and took out the forklift before painting.

Two days later, Voigt approached Fricano and told him to come to the main office, to ask him some questions about the incident. Fricano then asked for a steward or a representative (he was uncertain if he used the word "union"), to which Voigt responded that he did not need that because they were just going to ask him a few questions about what had happened.[26] In a conference room in the office, Williams handed Fricano General Counsel's Exhibit 19, an unpaid suspension for 3 days for an egregious violation of health, safety, or fire codes that could have resulted in severe injury to him and others. She stated that he would be terminated the next time and asked him to sign the warning. He refused and notated a disagreement. During the course of the meeting, Fricano asked for Howe, who came to the conference room. Howe stated that management had already made the decision and that he could not do anything about it. In the past 6 months, Fricano had received one discipline—a coaching note or written warning for insubordination.

Turning to the discretionary discipline allegation concerning Fricano and Bush, the Company's employment manual (GC Exh. 23 at 50–51) sets out disciplinary policies and distinguishes between "major" and "general" offenses. Major offenses include such misconduct as possession or consumption of intoxicants, acts of violent, harassing or interfering with coworkers in the performance of their duties, theft or intentional damage to company equipment, insubordination, and damaging equipment. These are grounds for immediate dismissal. "General" offenses are listed as misconduct such as non-compliance with plant safety rules, use of obscene or threatening language, and repetitive tardiness or absenteeism. For general offenses, a disciplinary action sequence is set out as: (1) verbal warning (with a written memo in the employee's file) for a first offense; (2) written warning for a second offense; (3) written warning and 3-day suspension without pay for a third offense; and (4) termination for the fourth offense. Following this sequence is a note: "Penalties imposed as a result of infractions of our rules may be modified by the Company when extenuating circumstances are found."

Bertozzi is the final decision maker on all disciplines, after input from the supervisor and Semsel of HR, who checks the file for prior disciplines and determines the appropriate level of discipline to be imposed. A supervisor's recommendation for discipline is normally accepted.

Prior to October 9, 2017, Rosaci was informed that Krajewski had been disciplined without notification to the Union. That day, Rosaci requested copies of all disciplinary actions issued to bargaining unit employees, and the basis of the discipline imposed, since the Union's certification (GC Exh. 15). He stated that this constituted a standing request for notification of future disciplinary actions and the bases for such, as well as a request to bargain prior to their imposition.

Schroder responded on October 11 (GC Exh. 16), stating that the Company was gathering the information that he requested. She further said that there had been no unilateral changes in the Company's disciplinary practices since the certification and that the status quo as per the handbook (with progressive discipline) and the code of conduct (including past practice on implementation of steps) would continue to be followed until there was an agreement with the Union to the contrary. The code of conduct is not in the record.

Rosaci on November 10 (GC Exh. 17) requested to meet and negotiate employee discipline prior to its issuance, stating that the Union's review of the Company's policies and actions indicated that the Company exercised discretion in issuing discipline.

At around this time, the Company furnished to the Union a copy of the discipline that it had imposed against Fricano, as well as copies of two others for safety violations (GC Exhs. 20, 21). In the first, Pauley, a painter, received a written warning on November 9 for unsafely operating a crane, resulting in damage to company property and endangering the safety of coworkers in the area. In the preceding 6 months, Pauley had received 5 disciplines, including a final written warning, one of which was for a safety violation. In the second, Supervisor Norway received a written warning on November 14 for improperly tacking equipment, causing the tacked-on piece to break off and endangering coworkers in the area. He had received no prior disciplinary action for the past 6 months.

At around this time, in a bargaining session, Rosaci brought up the discipline issued to Krajewski and said that it was inappropriate to give him discipline in the circumstances, considering his inexperience and the nature of the assignment. Bertozzi

[24] R. Exh. 6 contradicts Garcia's testimony since Hudson received a zero in assembly.

[25] Tr. 1249 (Howe).

[26] The Respondent (R. Br. 16) points to certain inconsistencies between Fricano's testimony and his affidavit, but their substances are not necessarily inconsistent, and they therefore do not undermine his credibility.

responded that the Company had considered giving him a verbal warning but had decided to give him a written warning. They discussed a number of other disciplines, copies of which the Company had furnished to the Union after their issuance. Bertozzi stated that the Company did not "discipline everybody for everything," and give warnings to everybody for everything and "we let some of them go."[27] Rosaci conceded that Howe responded to most of the Union's questions on the discipline, such as whether the employee had received training and the amount of any damage.

Howe testified that he, Bertozzi, and Voigt discussed how to discipline Fricano, including termination, but decided on a suspension based on the Company's progressive discipline policy. Thus, although Fricano had some write-ups in his folder, none of them were for safety violations, and it was unusual for Fricano to be so careless. Accordingly, "[W]e decided to exercise some discretion and landed on a suspension."[28] Howe later added that they believed that they had grounds to terminate him but decided to be lenient and instead suspend him. Bertozzi's testimony comported with Howe's. Thus, Bertozzi testified that he looked back at Fricano's prior disciplines as per the Company's procedure and found a written warning for insubordination and that in conjunction with the egregiousness of Fricano's safety violation, "[F]rankly, we should've terminated him but we didn't."[29] I discussed earlier Bertozzi's testimony about his decision to suspend Bush.

General Counsel's Exhibits 59–61 are other disciplines that the Company has issued for safety violations:

> (1) A written warning in August 2011, for deliberately tampering with settings on a machine on which a fellow employee was working, horseplay, and a safety violation that could have resulted in injury;
> (2) A written warning in November 2011, for having a high-pressure bottle unsecured to a weld machine, which fell over ("extremely dangerous"); and
> (3) A suspension in December 2017, to Norway, for welding in an area near the paint booth that was within an unsafe distance, creating a potential safety hazard that could have resulted in severe injury to him and others. The previous month, he had received a written warning for a safety violation.

Analysis and Conclusions

Bush and Hudson—8(a)(3) Allegations

The following analysis applies to all 8(a)(3) allegations in the complaint, including the January 2018 layoffs of 10 shop employees and the delay in providing performance reviews and wage increases, which I will later discuss.

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015).

Under *Wright Line*, the General Counsel has the burden of establishing that the employee's protected activity was a motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *East End Bus Lines, Inc.*, 366 NLRB No. 180 (2018), slip op. at 1; see *Allstate Power Vac., Inc.*, 357 NLRB 344, 346 (2011), citing *Willamette Industries*, 341 NLRB 560, 562 (2004); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010).

Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *East End Bus Lines, Inc.*, above, slip op. at 1; *Allstate Power Vac.*, above at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004); see also *Austal USA*, above at 364. To establish this affirmative defense, "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Where the General Counsel makes a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines, Inc.*, above, slip op. at 1; see also *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge "did not consider the strength of the General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"), enfd. 646 F.3d 929 (D.C. Cir. 2011); *NLRB v. CNN America, Inc.*, 865 F.3d 740, 759 (D.C. Cir. 2017).

Initially, I note that the Respondent's counsel has pointed out (R. Br. 113) that the Company had knowledge that numerous employees actively supported the Union and yet has never taken any adverse actions against many of them. Thus, some of the known union adherents were not among those laid off, and some even received work assignments that they desired.

However, this fact does not serve as evidence that the Company's actions against the alleged discriminatees were not motivated by antiunion animus. The Board, with approval by the courts, has long held that an employer's unlawful discrimination against some union supporters and activists is not negated simply because the employer did not discriminate against all union supporters. *Handicabs, Inc.*, 318 NLRB 890, 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Nabors, W.C. Co.*, 89 NLRB 538, 541–542 (1950), affd. 196 F.2d 272, 276 (5th Cir. 1952), cert. denied 344 U.S. 865 (1952); see also *Rust Engineering v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971) ("The punitive lay off of a single dissident may have—and may be intended to have—an in terrorem effect on others. . . ."); *NLRB v. Shedd-Browning Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954), citing *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941) (discouragement of protected activity may be effected by making some employees "an example."). In sum, selective discrimination has a naturally chilling

[27] Tr. 62–63 (Rosaci). Bertozzi did not deny making such statements.
[28] Tr. 1250.
[29] Tr. 1667.

effect on all employees, and discriminatory conduct need not affect all prime union activists. See, e.g., *Glenoaks Convalescent Hospital*, 273 NLRB 488, 491 (1984); *NLRB v. Challenge-Cook Brothers of Ohio, Inc.*, 374 F.2d 147, 152 (6th Cir. 1967); *W.C. Nabors Co.*, 196 F.2d 272, 276 (5th Cir. 1952), cert. denied 344 U.S. 865 (1952).

Furthermore, as to all three 8(a)(3) allegations, I draw an inference that they were motivated by animus based on Voigt's threats of adverse consequences to George and Thompson in January 2018, and Rulov in April 2018, for their support of the Union, and his telling Thompson in January 2018 that employees who supported the Union would be laid off. See *East End Bus Lines*, above at slip op. 9, in which the Board stated that 8(a)(1) violations occurring close in time to an adverse action against an employee are "particularly relevant" as far as showing unlawful motivation. See also *St. Mary Medical Center*, 339 NLRB 381, 381(2003) ("Animus can be inferred from the 8(a)(1) violations found by the judge.…").

Bush's Suspension

The sole basis for Bush's 3-day suspension without pay was the incident on December 21, 2017, involving the F.A.G. box. Bush engaged in union activity both at and away from the facility, and Director Howe, Foreman Scheidel, and Plant Manager Voigt knew of his support for the Union; on the day of the suspension, Bush testified without controversion that Voigt saw him wearing a union shirt. Animus is inferred from Voigt's statements, described above.

Animus against Bush can also be inferred from the following:

(1) The Respondent failed to conduct a full and fair investigation (see *Hewlett Packard Co.*, 341 NLRB 492, 492 fn. 1 (2004); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973)), and did not even interview Bush or afford him an opportunity to defend against the accusation of harassment. See *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004); *Tubular Corp. of America*, 337 NLRB 99, 99 (2001).

Thus, the Respondent did not interview either Bush or Domardaski—the coworker directly involved in the incident—before making the decision to issue Bush the suspension. The Respondent did not provide the testimony of either Voigt or Kraebel, or any witness to what occurred; the testimony of either Semsel or Williams of HR; or any documentation showing an investigation. In this regard, Voigt told Bush that he was not behind the suspension, so who, if anyone, complained about Bush's conduct, and what was reported, remains unknown.

(2) Related to this, the Respondent did not follow its own stated disciplinary procedures and policies. See *Fayette Cotton Mill*, 245 NLRB 428 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713–714 (1978).

The Company's employee manual specifically states that any reported allegations of discrimination or harassment "will be investigated promptly, thoroughly and impartially. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge." Yet, neither Bush nor Domaradski were even interviewed.

(3) The Respondent treated Bush disparately vis-à-vis other employees who have engaged in more egregious conduct yet received lesser disciplines. See *Arigas USA*, LLC, 366 NLRB No. 104, slip op. at 1 (2018); *Comaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011).

Even according to Bertozzi, who made the decision to suspend Bush, Bush's conduct did not entail any threats or aggressive conduct toward any coworker. Yet, an employee who, in March 2017, apparently used an obscenity to a coworker and kicked garbage at him received only a coaching note (verbal warning, the least severe level of discipline). The same discipline was issued in December 2017 to an employee who became "aggressive" and threatened to "kick another co-workers[sic] ass." Finally, although there is no documentation in the record, Garcia testified that he recommended a written-write up for Rulov for making a gesture that a coworker felt was "an offensive physical contact." Moreover, in those situations, the affected coworkers apparently complained, whereas Domaradski did not. I realize that it is not my prerogative to second-guess how the Respondent decides to discipline types of misconduct, but one must question why employees who engaged in expressly threatening and offensive behavior received lesser discipline, only verbal warnings in two cases, whereas Bush received the most severe discipline short of termination.

I now turn to whether the Respondent has rebutted the General Counsel's prima facie case. I will first address the Respondent's defense that Bush's suspension was consistent with discipline issued to other employees who have violated the anti-harassment policy. The Respondent cited two cases where employees received a 3-day suspension, one in May 2016, the other in December 2017. In both, the suspended employee used overtly racial or ethnic slurs to coworkers ("gooks," "chigger," "polack"), who obviously took umbrage. In contrast, Bush's remark was ambiguous and not expressly homophobic—he did not use the word "fag" or any other derogatory term—and Domaradski took no offense.

Bush was providing Domaradski with a heavy-duty box that he wanted to use in his work. In giving him the "F.A.G." box, Bush set it down and simply said jokingly, "Here's your box." Domaradski found it humorous and laughed. He certainly was not harassed, either subjectively or objectively speaking. Even according to the narrative in the suspension notice, Bush simply held up the box, approached Voigt and pointed to the box and Domaradski, and said, "Look what I have. It's Rob's tool box . . . ." The innocuousness of Bush's conduct on this record did not justify any kind of discipline, let alone a 3-day suspension without pay.

Accordingly, I conclude that the Respondent has not rebutted the General Counsel's prima facie case and that its suspension of Bush violated Section 8(a)(3) and (1) of the Act.

Hudson's Assignment and Denial of Overtime

Hudson initiated the Union's organizing campaign among the employees, served as the Union's observer at the election, was on the Union's negotiating team, participated in union demonstrations outside the facility, and openly wore union insignia at work. Foreman Scheidel knew of Hudson's open support for the Union, and Director Howe conceded at trial the Company's

knowledge of this. The element of animus is satisfied by Voigt's statements to employees threatening retaliation for their union support, as described earlier. Accordingly, the General Counsel has set out a prima facie case of an 8(a)(3) violation.

I now turn to whether the Respondent has rebutted the General Counsel's prima facie case regarding Hudson's assignment to the saw. Prior to the February 8, 2018, Hudson, a certified welder, performed welding and had a reputation for being one of the best welders. He had practically no experience working the saws, which was considered the work in the shop requiring the least amount of skill and to which less experienced and lower skilled welders were assigned when welders were needed to operate them.

No fulltime welder other than Hudson has been assigned to work the saw. After the recall, all other welders continued to perform welding work, as did Gino, a temporary employee. When Bush asked Supervisor Norway why Hudson was on the saw, Norway replied that Gino did not know how to use the saw. However, after Hudson was injured in July while operating the saw, Gino ran the saw as well as welded. Among the regular welders, Thompson was the only one assigned to work the saw during this period; he worked the small saw for a couple of days a couple of months after the recall, while Hudson operated the large saw.

Supervisor Garcia unsuccessfully attempted at trial to paint Hudson's assignment to the saw as a benefit rather than as an adverse action. Thus, he testified that he, Voigt, and the other supervisors discussed the placement of employees after they returned from layoff, to maximize efficiency and to afford some employees an opportunity to expand their skill sets and be more versatile. However, of the other four employees who were given new assignments after the layoff, three were afforded opportunities to enhance their skills as welders, and the fourth (Krajewski) was given the opportunity to work in the paint department. All of them continued to perform at least some welding work. Garcia testified that he advocated putting Hudson on the saw because Hudson had experience in welding and assembling, but he had not personally seen Hudson work on the saw. However, Respondent's Exhibit 6 contradicts Garcia's testimony that Hudson had experience in assembling. Indeed, if the Respondent wanted to give Hudson a wider range of skills to enhance his abilities as an employee, he could have been assigned to another type of work that required skill, as was Krajewski, not the least-skilled work in the shop. In sum, Hudson's assignment to the saw can scarcely be described as an "opportunity;" rather, he properly characterized it as "punishment."

Accordingly, I conclude that the Respondent has failed to rebut the General Counsel's prima facie case and that Hudson's assignment to the saw violated Section 8(a)(3) and (1) of the Act.

As to the denial of overtime, Hudson repeatedly requested overtime from Norway when he returned from layoff and was assigned to the saw. Norway responded that Hudson was not approved to work overtime. However, overtime was offered to welders after the recall. Most significantly, when Thompson operated the cold or small saw for a couple of days, while Hudson operated the main saw, Thompson was permitted to work overtime.

Accordingly, I conclude that the Respondent has failed to rebut the General Counsel's prima facie case and that Hudson was denied overtime in violation of Section 8(a)(3) and (1) of the Act.

Fricano's Interview

Pursuant to *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Board has held that an employee has a right to union representation in an investigative interview when the employee reasonably believes the interview may result in discipline. Here, Howe's testimony clearly revealed that Fricano knew on October 23, 2017, that he had committed a serious safety offense. Thus, when Howe came over to Fricano and in essence told him that what he was doing was unsafe, "[H]is eyes doubled in size as he glared at me and immediately began to accuse other people of telling him to do it."

Therefore, when Voigt told Fricano to come to the main office to answer some questions about the incident, Fricano had reasonable cause to believe that the interview might result in discipline. Fricano was uncertain if he used the word "union" when he asked for a steward or a representative, but that does not affect the validity of his request: "Board law is clear that '[n]o magic or special words are required [to trigger a *Weingarten* request] . . . . It is enough if the language used by the employee is reasonably calculated to apprise the [e]mployer that the employee is seeking such assistance.'" *Circus Circus Casinos, Inc.*, 366 NLRB No. 110, slip op. at 1 (2018), citing *Houston Coca Cola Bottling Co.*, 265 NLRB 1488, 1497 (1982); see also *Consolidated Edison Co. of New York*, 323 NLRB 910, 916 (1997).

Accordingly, the Respondent violated Section 8(a)(1) when Voigt denied Fricano's request to have a union representative present at an interview that he reasonably thought could result in discipline (and in fact did), and then proceeded with the interview.

Discretionary Discipline

The testimony of both Bertozzi and Howe, and documents of record, establish that the Respondent does exercise considerable discretion in determining what discipline is appropriate in a particular situation. Discretionary discipline is a mandatory subject of bargaining. *Total Security Management Illinois1, LLC*, 364 NLRB No. 106, slip op. at 10 (2016), wherein the Board set out a new policy concerning bargaining over employee discipline. It held that an employer must provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision before imposing serious discipline (absent a showing that the employee's continued presence at work presented an imminent danger to its business or employees). It stated that an employer need not await an overall impasse in bargaining before imposing discipline, provided that it exercises its discretion within existing standards and procedures; however, it still must continue to bargain over its action, including the possibility of rescinding it, until reaching agreement or impasse. Ibid, slip op. at 12.

The Board has not yet applied *Total Security* in any subsequent decisions, so its interpretation remains in uncharted territory. In any event, the Respondent did not engage in any bargaining with the Union before it issued suspensions to Bush and Fricano, and it thereby violated Section 8(a)(5) and (1).

February 8, 2018 Layoffs—8(a)(3) and (5)

Since 2001, there were three major layoffs prior to 2018, occurring in 2001, 2009, and 2015. Bertozzi testified that all three were due to the status of the Company's business operations. In 2001, 15–20 employees were laid off, apparently on a temporary basis (see R. Exh. 25); the breakdown between shop and office (engineering or purchasing departments) is unknown. In 2009, approximately 20 people were laid off for lack of work orders. About half were in the office, including engineers; the other half were in the shop. On January 8, 2015, there was a permanent layoff of 10 shop employees and seven office employees (see GC Exh. 38 at 1–2).

Concerning the February 8, 2018 layoffs of 10 shop employees, Howe testified that the Respondent had a slowdown in bookings in the fourth quarter 2017 and the one large booked job was in Canada, where most of the work was going to be subcontracted to local businesses. The Company realized around Labor Day 2017 that there would be less billable work in the coming year and told the Union during negotiations that because of this, there might be a layoff.

Rosaci recalled that the first time that the subject of layoffs was mentioned to the Union was at the September 24, 2017 negotiations session, when Schroder stated that the Company was going to have a layoff due to a sudden downturn in work. Rosaci asked the extent and anticipated date. She replied, 8–12 employees, tentatively on either February 9 or 16, 2018. At subsequent meetings, the parties exchanged proposals, some oral and others in writing, but reached no agreement.

In Respondent's Exhibit 16, sent to the Union on February 2, 2018, Howe set out the methodology that the Company was going to use for the planned layoff of shop employees by skills and abilities in various categories of work, to ensure continued production during the layoff.[30] The Company anticipated the layoff to be 6–8 weeks. This became the basis of the Company's initial proposal to the Union.

Respondent's Exhibit 2 consists of proposals and counter-proposals made between January 24 and February 8 regarding the criteria that would be used for selecting employees for layoff. As per the Company's proposal to base layoffs on skills and abilities, a chart of employees' ratings was presented to the Union on February 1, designating 10 employees necessary to run the shop regardless of their ratings (R. Exh. 6). The Union's counterproposals were for layoffs to be in order of least plantwide seniority, with recalls to be by most such seniority.

The parties met on February 8. The Company informed the Union that 10 named production employees were being laid off that day (see GC Exh. 40).[31] They exchanged proposals regarding the laid off employees, and Schroder stated that it was the Company's final proposal (see R. Exh. 2 at 11–14). It provided for layoffs to be in order of least seniority within a classification and recalls to be by skill and ability. Laid off employees were to be recalled no later than April 9, absent a drastic change in business circumstances. There were also provisions regarding medical and other benefits to laid off employees. It is undisputed that the parties did not bargain to agreement over the terms of the layoffs. Subsequently, two employees were recalled prior to April 9; the rest on April 9.

George and Thompson testified about conversations with Voigt that bore on the layoffs. Voigt did not testify thereon, George's testimony was corroborated by notes he took of their conversation (GC Exh. 41), and I find the following.

As described earlier, Voigt told George on January 10, 2018, that the Company had "plenty of work" but was going to stage a layoff and then "bring in all new people."

On February 8, 2018, the day of the layoffs, Thompson attended a union rally that took place outside the facility during the lunch hour. After lunch, he was in his work area at around 1:30 p.m. when Voigt came over. Voigt stated that he was "really pissed" because people were blocking him from leaving the parking lot, yelling at him, and taking pictures of his license plate.[32] Thompson replied that he did not agree with that but that also did not agree with the layoffs. Voigt responded that the same people who were laid off were the ones who were going to keep on getting laid off.

Analysis and Conclusions

As to the 8(a)(3) allegation concerning the layoffs, I have already discussed how the element of animus has been satisfied as far as the General Counsel making out a prima facie case of discrimination. Specifically, as to layoffs, Voigt told Thompson on January 25, 2018, that employees who supported the Union would be laid off. Furthermore, on the day of the layoffs, after Voigt complained about the union rally outside the facility, he told Thompson that the people who were laid off were the same ones who were going to keep on being laid off. Such statement implicitly suggested that certain employees were targeted to be laid off, both then and in the future. On January 10, 2018, George asked Voigt if the Company was busy, to which Voigt responded, "Yes, we have plenty of work, don't worry, you know, we're busy." George then sad, "Oh, so it's only by design that we're slow?," and Voigt replied, "Yeah, we're just taking it in the ass until all this goes away." He further stated that once the Company started to ramp up again, they would bring in all new people.

Threats by supervisors of job loss due to employees' union activity support a finding that a subsequent relocation of operations or contracting out of operations, ostensibly for business reasons, was unlawful. See *Taylor Machine Products*, 317 NLRB 1187, 1187, 1212–1214 (1995), enfd. in relevant part 136 F.3d 507, 515 (6th Cir. 1998); *Jays Foods, Inc.*, 228 NLRB 423, 423, 429–430, 433 (1977), enfd. as modified 573 F.2d 438, 442–443, 445–446 (7th Cir. 1978), cert. denied 439 U.S. 859 (1978). See also *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (enfg. 271 NLRB 1320 (1984) (where an employer's representative has announced an intent to retaliate against an employee for engaging in protected activity, the Board has before it "especially persuasive evidence" that a subsequent adverse action was unlawfully motivated), cert. denied, 476 U.S. 1159 (1986); *L'Eggs Products, Inc. v. NLRB*, 619 F2.d 1337,

[30] Unless otherwise specified, written communications between the Union and the Company outside of negotiations were by email

[31] In addition, Domaradski would be deployed to shipping and handling based on company needs. Scheidel was also laid off that day.

[32] Tr. 354.

1343 (9th Cir. 1980), affg. in relevant part, 236 NLRB 354 (1978).

The fact that there were prior layoffs of shop employees and that they might have been necessitated by legitimate business considerations does not bear on the legitimacy of the April 2018 layoffs, which must be independently evaluated.

Howe testified that the Respondent had a slowdown in bookings in the fourth quarter 2017 and the one large booked job was in Canada, where most of the work was going to be subcontracted to local businesses. The Company realized around Labor Day that there would be less billable work in the coming year and told the Union during negotiations that because of this, there might be a layoff.

However, the Respondent failed to produce any documentation solely in its possession that would have supported Howe's testimony and substantiated its claim of economic justification for the layoffs. This undermines the Respondent's economic defense and warrants drawing an adverse inference that if such records had been produced, they would not have been favorable to the Respondent. *Reno Hilton*, 282 NLRB 819, 842 (1987); *Welcome-American Fertilizer Co.*, 169 NLRB 862, 870 (1968), enf. denied on other grounds 443 F.2d 19 (9th Cir. 1971); see also *Auto Workers v. NLRB*, 459 F.2d 1329, 1336–1337 (D.C. Cir. 1972). As the Supreme Court observed in *Interstate Circuit v. U.S.*, supra at 225–226, with respect to witness testimony rather than documentary evidence, "The production of weak evidence when strong evidence is available can lead only to the conclusion that the strong would have been adverse."

I therefore conclude that the Respondent has failed to rebut the General Counsel's prima facie case that the layoffs were motivated by animus and that the layoffs violated Section 8(a)(3) and (1).

As to the 8(a)(5) allegation, layoffs are a mandatory subject of bargaining. *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 (2017); *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), reaffirmed 356 NLRB 1056 (2011), affd. 371 Fed. Appx. 167 (2nd Cir. 2010), vacated on other grounds 562 U.S. 956 (2010); *Tri-Tech Services., Inc.*, 340 NLRB 894, 894 (2003). Even if the Respondent had a past practice of instituting economic layoffs due to lack of work, the advent of the Union removed its unilateral discretion with respect to layoffs, and it still had an obligation to bargain with the Union over them. *Eugene Iovine*, above; *Adair Standish Corp.*, 292 NLRB 890, 890 at fn. 1 (1989), enfd. in relevant part 912 F.3d 854 (6th Cir. 1990); see also *Falcon Wheel Div., L.L.C.*, 338 NLRB 576, 576–577 (2002).

Where the parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a subject matter. Instead, it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole, with two limited exceptions—economic exigency or where the union has attempted to delay bargaining. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. 15 F.3d 1087 (9th Cir. 1994), citing, inter alia, *NLRB v. Katz*, 369 U.S. 736, 743 (1962); see also, e.g., *Alaris Health at Rochelle Park*, 366 NLRB No. 86, slip op. at 1 fn. 4 (2018). This applies to bargaining over an initial contract. *Lawrence Livermore National Security, LLC*, 357 NLRB 203 (2011); *Northwest Graphics, Inc.*, 343 NLRB 84 (2004); *Vincent Industrial Plastics, Inc.*, 328 NLRB 300 (1999); *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995).

This obligation extends to layoffs and recalls. *Lawrence Livermore National Security*, above; 357 *RBE Electronics of S.D.*, above. The Respondent implemented the layoffs and recalls without there having been an overall impasse in bargaining. Although the Respondent contends in so many words that there were economic exigencies justifying an exception to the normal rule (R. Br. at 78, et. seq.), the Respondent offered no documentation whatsoever and thus failed to substantiate its evidentiary burden of establishing such. In this regard, the Respondent first raised the subject of layoffs at negotiations in September 2017 and stated that the planned effectuation date was in February 2018, approximately 5 months in the future, indicating that no genuine economic emergency arose shortly before the layoffs. Therefore, the layoffs violated Section 8(a)(5) and (1) as well.

Reviews and Wage Increases—8(a)(3) and (5)

A. History

The employee manual (GC Exh. 23 at 18) states that "[u]nder usual and appropriate circumstances, employees should receive a performance review annually," unless an employee's job responsibilities change substantially.

Through the years, Scheidel conducted periodical reviews as per the Company manual,[33] with a time interval sometimes more than 1 year. Prior to 2015, reviews were given in the January–March period, with wage increases based thereon put into effect shortly thereafter. Shop and office employees received both evaluations and increases in the same timeframe.

The process changed in January 2015, following the big layoff that month. Management held a meeting with the remaining employees in the breakroom and explained the Company's financial situation and that the Company did not know how long it would take for the order backlog to completely fill back up. The Company would proceed with annual reviews in February/March but could not give increases at that time; hopefully, they could be given later in the year.

In 2015, the Company's financial situation improved by virtue of booking some orders and increasing the backlog, so in August 2015, it proceeded with the wage increases.

In approximately January or February 2016, at a company-wide meeting in the breakroom, Bertozzi stated that it was predicted that 2016 would be a slow year and that henceforth reviews were going to be moved to the end of September or early October so that the Company would have a better idea of what kind of year they had.

Reviews for the period from January 1–October 1, 2016 were given to all employees in early October 2016, with raises effective the week ending October 8, 2016 (see GC Exh. 11,

[33] See GC Exhs. 46–52 as examples. Employees are rated by category as: meets, exceeds standard, or needs improvement.

Schroder's June 19, 2018 response to the Union's request for information).

Thereafter, reviews for nonbargaining unit employees were conducted in November and December 2017, but unit employees did not receive them until mid-April 2018, after they returned from layoff. Bertozzi's explanation for this difference was: (1) the shop was very busy and late on a number of products, and the Company did not want anything to detract from that direct labor; (2) the wage component to the unit employees' reviews had to be negotiated with the Union. Howe gave a similar explanation, that at the end of 2017: [34]

> [W]e were extremely busy, and as we were getting—as—as work was moving out of engineering and out of the office more so into—and getting finished in the shop and supply chain, we had opportunities to conduct those reviews with the professional staff. The—the shop was slammed and—at the time—and so we decided to wait until there was a better opportunity to conduct those with more time.

I note that in contrast to the direct and confident manner in which Howe testified in general, this portion of his testimony was vague and hesitant.

Performance reviews are used to assess skill and ability and job performance, the bases for wage increases. Generally, managers and Wendt (Sr. or Jr.) would arrive a wage increase guideline or base percentage rate, based on the Company's performance during the rating period. If a supervisor or manager has wanted an individual to get more (or less), based on merit or job changes, he could recommend to management a higher or lower percentage increases. Scheidel submitted evaluations to Howe, in conjunction with his recommendation that an employee receive a greater increase based on productivity longevity, pay comparison with other employees, and attendance. Howe accepted about half of Scheidel's recommendations, adjusting or denying the remainder.

Joint Exhibits 2(a) and 2(b) are sample summaries of reviews and wage increases received by unit employees and nonunit employees, respectively, with entries going as far back as the 2002–2003 evaluation period.

B. Bargaining

The Union made an information request dated June 25, 2017, requesting, inter alia, wages increases for the past 3 years for each employee (GC Exh. 4). The Company's response (GC Exh. 5), which Rosaci received on about July 17, showed that the last increases were effective on October 3, 2016. At the November 3 bargaining session, Rosaci asked the Company to conduct the annual reviews for 2017, as per the Union's understanding of the Company's practice. He further requested that they be provided to the Union and that the Union wished to bargain over the process and the wage amounts before they were implemented. He received no response at that meeting and followed up 3 days later with a written request for such (GC Exh. 6). Schroder responded on November 14 (GC Exh. 7), stating that employee evaluations would occur "in due course as time and production schedules permit as has been the Company's past practice. As you are likely aware, the Company's history has not been regimented with regard to these items."

At negotiations on May 8, 2018, the Company proposed a general wage increase of 3.42 percent retroactive to April 8, 2018 (see GC Exh. 8), the date evaluations were completed. At the following session, the Union verbally proposed a 4 percent increase retroactive to October 2017.

The Company responded in writing at the May 24 bargaining session (GC Exh. 9), reiterating its original proposal and stating that if its proposal was not accepted on or before June 20, the Company would rescind the retroactive portion of the proposal.

According to Rosaci , the Union accepted the Company's proposal, but he stated that the Union still wished to bargain for the increased amount and retroactivity to October 2017, and Schroder stated, "Fair enough. You can bargain for that."[35] Hudson and Greiner testified that retroactivity was left open for further negotiations. Their version was consistent with the subsequent communications of the Union's attorney with Schroder, described below.

I credit Hudson and Greiner and Rosaci (to the extent that he testified retroactivity was left open) and find that the Union requested further bargaining on retroactivity, over the testimony of Howe, Dates, and Bertozzi that the parties agreed that such bargaining was foreclosed. I base this on (1) the union attorney's communications with the Company after the meeting; (2) the stiltedness and unbelievability of Bertozzi's testimony that at the May 24 session, he said, "So we're done now? . . . . [T]he issue is closed," and Rosaci said yes;[36] and (3) the lack of any mention of Dates' attendance at the meeting in the Company's notes. In this respect, Dates' testimony on the subject was conclusionary and lacking in detail, and Bertozzi could not state for certain if Dates was at the May 24 meeting. Therefore, I cannot be satisfied that he was actually present at the meeting or was told what was said after the fact.

Shop employees ultimately received raises effective the week ending June 2, 2018, retroactive to April 8, 2018.

C. Request for Information

At the May 24 session, the Union asked for the dates that nonunit employees/office personnel received wage increases because the Union understood unit employees usually received them at the same time. This was one of the requests in the Union's request for information of May 29 (GC Exh. 10). In her response of June 19 (GC Exh. 11), Schroder replied, "The Union does not represent the salaried workforce."

On June 22, Michael Evans (Evans), the Union's attorney, reiterated the Union's request for such information (GC Exh. 12), stating that the Union understood that bargaining unit employees historically were reviewed and received wage increases before non-bargaining unit employees and that unit employees should receive wage increases retroactive to at least the date that nonunit employees were given raises and reviews. He further stated that the information was also needed for bargaining as per the Union's stated desire to negotiate for greater retroactivity.

[34] Tr. 1258.
[35] Tr. 42.
[36] Tr. 1645.

Schroder replied on July 6 (GC Exh. 13), stating that the Union's understanding was incorrect and adding that the Union and the Company had reached agreement on retroactivity and raises in bargaining, when the Union accepted the Company's wage and retroactivity offer.

The last communication on the subject was Evans' response of July 11 (GC Exh. 14), reiterating the request for the information and the reasons that the Union considered that requested information relevant. He further stated that the parties had not reached any final agreement regarding the wage increase; the Union had explicitly reserved the right to bargain for future retroactivity, and Schroder had agreed that the Union could continue bargaining on the issue ("Thus, the final retroactivity of the wage increase is still a live issue in bargaining."). The Respondent never provided the Union with this information.

Analysis and Conclusions

8(a)(3) Allegation

An employer violates Section 8(a)(3) and (1) by suspending annual evaluations and concomitant pay raises when motivated by antiunion animus. *United Rentals, Inc.,* 350 NLRB 951 (2007); *Grossen Co.*, 254 NLRB 339 (1981). *Regional Home Care, Inc.*, 329 NLRB 85, (1999).

I previously concluded that the element of animus has been satisfied as far as the General Counsel making out a prima facie case of discrimination. I now turn to whether the Respondent has rebutted it.

Whereas reviews for nonbargaining units were conducted in November and December 2017, reviews for unit employees were not conducted until mid-April 2018, after they returned from layoff. Bertozzi proffered two reasons for this difference in timing, neither of which was believable. Firstly, he (and Howe) testified that the shop was very busy in late 2017, but the Respondent produced no records demonstrating this. In any event, it is hard to see how preparing evaluations would have been so time-consuming for supervisors as to interfere with the Company's ability to conduct its business. Secondly, Bertozzi testified, the wage component had to be negotiated with the Union. However, Fess and Garcia testified that when they submitted their evaluations to Voigt in April 2018, they had no discussions about wages, so that the evaluations could have been prepared earlier than the wage increase phase.

Again, as with the business justification for layoffs, the Respondent failed to produce any documentation showing that the volume of business in late 2017 was of such magnitude that preparing shop employees' evaluations would have been prejudicial to its operation, undermining Bertozzi's and Howe's assertions and warranting an adverse inference. See *Reno Hilton*, above; *Welcome-American Fertilizer Co.*, above; *Auto Workers v. NLRB*, above.

Therefore, I conclude that the Respondent failed to rebut the General Counsel's prima facie case and that the delay in giving unit employees evaluations and concomitant wage increases violated Section 8(a)(3) and (1).

8(a)(5) Allegation

With respect to bargaining, Section 8(d) of the Act specifies wages as one of the mandatory subjects of bargaining. Evaluations have the potential to affect the wage rate an employee might receive and therefore are also a mandatory subject of bargaining, requiring negotiating any changes. *Weyerhaeuser NR Co.*, 366 NLRB No. 169 (2018), citing *Saginaw Control & Engineering*, 339 NLRB 541 (2003).

Prior to the Union's certification, the Respondent did not always follow the policy enunciated in the employee manual that employees receive annual reviews absent unusual circumstances. However, in prior years, wage increases based thereon were put into effect shortly after the employees were presented with them. Nothing in the record demonstrates that shop employees and office employees were treated differently as far as the timing of their evaluations and increases. In the most recent year prior to the certification, reviews for the period from January 1–October 1, 2016, were given to all employees in early October 2016, with raises effective the week ending October 8, 2016. However, whereas reviews for nonbargaining units were conducted in November and December 2017, reviews for unit employees were not conducted until mid-April 2018, after they returned from layoff.

It is well settled that an employer has the duty to proceed as it would have done had a union not been on the scene. *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976); see also *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), enfd. 658 F.2d 1 (1st Cir. 1981). Accordingly, an employer's obligation to maintain the status quo sometimes entails an obligation to make changes, when those changes are an established part of the status quo, such as when an employer has an established practice of granting employees a 1-percent increase in wages on their anniversary date. *Total Security Management*, above, slip op. at 4 (2016); citing *Southeast Michigan Gas Co.*, 198 NLRB 1221 (1972), affd. 485 F.2d 1239 (6th Cir. 1973).

Therefore, the Respondent was obliged to provide unit employees with evaluations during the same period that it did so for the shop employees, in late 2017, and to grant them wage increases within a short-time thereafter. Instead, it did not evaluate them and give them such until April 2018. By this conduct, the Respondent's conduct violated Section 8(a)(5) and (1).

Regarding the bargaining over wage increases, Rosaci at the bargaining session on November 3 asked the Company to conduct annual reviews for 2017 for unit employees, and he requested bargaining over the process of evaluating unit employees and the wage amounts they would receive prior to implementation.

The record does not disclose that the Respondent made any proposals prior to the May 8, 2018 negotiations session, when the it proposed a general wage increase of 3.42 percent retroactive to April 8, 2018, the date evaluations were completed. At the following session, the Union verbally proposed a 4 percent increase retroactive to October 2017. The Company responded in writing at the May 24 bargaining session, reiterating its original proposal and stating that if its proposal was not accepted on or before June 20, the Company would rescind the retroactive portion of the proposal. Rosaci accepted the Company's proposal but stated that the Union still wished to bargain further on retroactivity. The Company has treated the subject of the wage increase closed.

The Respondent argues (R. Br. at 85–86) that the Union

bargained for and accepted the Respondent's wage proposal, thereby waiving any rights to object to its implementation. As to the retroactivity component, I have found that the Union expressly stated its desire to continue bargaining.

As far as the wage increase of 3.42 percent, the Respondent (R. Br. 91, et. seq.) correctly points out that the Union agreed to this on across-the-board basis and that individual employees might have received more or less than this amount under established past practice. However, the Respondent never modified its original proposal and effectively secured the Union's acquiescence by threatening to rescind the retroactivity provision. I note that the Respondent's initial proposal was on May 8 and that only approximately 2 weeks later, the Respondent stated that it was a final offer. This could hardly be considered to have afforded the Union timely notice and a meaningful opportunity to bargain. See *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999), enf. granted and denied in part 233 F.3d 831 (4th Cir. 2000). Moreover, the Respondent denied the Union's request for information about the wage increases that it had given to nonunit employees.

Waiver is not lightly inferred and must be "clear and unmistakable." *Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 2 (2018), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693,709 (1983); *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). Thus, the part asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Weyerhaeuser*, ibid, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Moreover, the party asserting waiver bears the burden of proof. Ibid; *TCI of New York*, 301 NLRB 822, 824(1991). Based on the above, I conclude that the Respondent has failed to meet this burden.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith over the performance reviews and wage increases to unit employees.

Request for Information

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Requests for information concerning the terms and conditions of bargaining unit employees are presumptively relevant. *Postal Service*, 359 NLRB 56, 56 (2012); *LBT, Inc.*, 339 NLRB 504, 505 (2003); *Uniontown County Market*, 326 NLRB 1069, 1071 (1998). On the other hand, requests for such information regarding nonbargaining unit employees do not enjoy that presumption, and the union bears the burden of showing relevance. *Southern California Gas Co.*, 342 NLRB 613, 614 (2004); *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988). However, that burden is not a heavy one, requiring a showing of probability that the desired information is relevant and would be of use to the union in carrying out its statutory duties and responsibilities. *Acme Industrial*, above at 437; *Postal Service*, 310 NLRB 391–392 (1993).

The information that the Union sought regarding the dates that nonunit employees received wage increases had a direct bearing on the retroactivity aspect of the wages increases for unit employee, which was discussed at negotiations and on which the Union wished further bargaining, as reflected in Evans' June 22, 2018 email to Schroder. Such information would have assisted the Union in determining how to fashion its proposals on retroactivity and also, perhaps, to its proposals regarding future increases. Accordingly, the Union met its burden of showing the requested information's relevance to the Union's representation of unit employees, and the Respondent violated Section 8(a)(5) and (1) by not furnishing that information.

Shop Supervisors

A. Framework

Production employees are supposed to "clock in" or scan their badges on each job so that their time is charged thereto (a direct labor charge, or production work). An indirect barcode is used for maintenance work, painting, unloading trucks, cleaning, and truck driving, which are not classified as production. Scheidel testified that the goal was that production workers perform 93 percent direct, and the remainder indirect. Certain witnesses at times appeared to blur this distinction, which is not entirely clear.

At all times, Hoerner, the warehouse/logistics supervisor has supervised the shipping and receiving clerks. He reports to Supply Chain Manager Dates. Prior to June 2017, two shop foremen, Scheidel and Quarcini, supervised production employees. They reported directly to Howe. That month, Quarcini left, leaving one of the two shop foremen positions vacant. In August 2017, Voigt, the manufacturing/engineering manager, was promoted to plant manager, with responsibilities for the shop as well as for manufacturing/engineering (see GC Exh. 56, an email announcing his promotion to employees). Thereafter, Scheidel reported to him. Scheidel supervised all 35–40 shop employees.

B. Creation

Tom Wendt, Sr., and Tom Wendt, Jr., and management were involved in the decision to restructure the shop supervision in September 2017, designed to organize supervisors along lines of physical space, by bay, to maximize material flow.

General Counsel's Exhibit 26 is the undated posting for "Three Shop Supervisors" that was posted in late August, with each to have responsibilities over different operations in the plant.[37] Their duties were to include such supervisory functions as assignment of work and providing annual reviews of their staff members.

[37] I base this date on GC Exh. 27, dated September 1, 2017, and Rosaci's testimony.

When Fess, Garcia, and Norway were promoted as of September 25, 2017, they were titled shop supervisors: Fess for building 2 and the yard; Garcia for building 4; and Norway for building 1. Scheidel was made shop supervisor for building 5 and changed from salaried to hourly. After Scheidel left, his responsibilities were assumed by the other shop supervisors.

The job description for shop supervisor is set out in Respondent's Exhibit 21 (duplicated as R. Exh. 13). The summary states that the shop supervisor is a "working supervisor" position and then goes on to describe various indicia of statutory supervisory authority, which duties are reiterated in the essential functions section. That section does not specifically describe non-supervisory functions. However, it implies such by stating, "perform your role as an individual contributor in such a manner so that it sets the bar for others to follow," "[t]he ability to work more than 40 hours per week as needed to assure completion of work, and "[w]ork outdoors in all seasons." The ADA Requirements section states, inter alia, frequent use of hands to handle and control tools; bend or twist of the body when operating equipment; and operate a fork truck.

No production employees were hired to backfill the unit positions that the shop supervisors vacated; the expectation was that they would do less production work.

C. Bargaining

At an early bargaining session, Schroder stated that the Company was considering promoting unit members into supervisory positions but named no individuals.

After Rosaci received the posting for the shop supervisors' positions from an employee at the end of August, he emailed Bertozzi on September 1 (GC Exh. 27). Referencing the notice, Rosaci asked if those positions would include performance of production work and if any of them would assume the duties of a leadman. Because the Union considered leadmen to be unit employees, he requested bargaining over the new positions.

Schroder responded on September 6 (GC Exh. 28), stating that there would be no unilateral change because all supervisors had always been "working supervisors" and leadmen were not in the bargaining unit. She contended that the Company was not obligated to bargain over the decision or its effects but would be willing to discuss tangential items that were bargainable at the scheduled negotiations on September 15.

At negotiations on September 15, the Company made a proposal on company work (GC Exh. 29), providing that the parties recognize that no work was exclusively "bargaining unit" work and that positions outside of the bargaining unit, including statutory supervisors, performed work similar to or identical to the duties performed by members of the bargaining unit. The Union rejected this proposal. Rosaci asked for job descriptions of supervisors, which Howe provided. Rosaci also asked how much shop work the supervisors would be doing. Schroder replied that she did not know but that the Company had the right to make supervisors and that, historically, supervisors had done shop work. Rosaci responded that his information was to the contrary.

At September 25 negotiations, Schroder stated that the Company was going forward with the promotions. Either at that meeting or a previous meeting, the Union made a proposal that limited the work that a supervisor could do to emergency and certain other special situations, which the parties discussed. In this meeting, the Company notified Rosaci that, effective immediately, Fess, Garcia, and Norway were promoted and deleted from the bargaining unit (GC Exh. 30). The Company announced the promotions in a September 27 email to employees and a posting outside the cafeteria (GC Exhs. 55, 45), stating that all three would report directly to Voigt.

Rosaci made an information request on October 10, 2017 (GC Exh. 32), requesting, inter alia, the names of past supervisors who performed production work and when they were employed. Schroder responded on October 24, with a listing of names and dates (GC Exh. 33 at 3). Former supervisors were Dave Dietrich, April 2016; Mike Fialokowski, January 1998–October 2005; Jastrzab, October 2010–May 2014; Pat Krzysiak (Krzysiak), August 2011–March 2016; Jim Phelan, July 1995–November 2005; and Quarcini, July 2016–June 2017. Current supervisors were Hoerner, since February 2017; Scheidel, since September 2004; and Srjan Sikirica (Sikirica), since March 2007.

On an unknown date Rosaci made an oral request for information pertaining to the wage rates for the working supervisors. Bertozzi responded on January 3, 2018 (GC Exh. 31), stating that upon successful completion of their 90-day evaluation period, they would be increased from their current hourly rates ($18, $21.03, and $21.09 per hour) to $24.00 per hour.[38] The Union was never provided an opportunity to bargain over this change to their wage rates.

D. Unit Work Performed by Other Supervisors

The Respondent contends that the performance of unit work by the shop supervisors is consistent with past practice, a conclusion that the General Counsel disputes.

Former Plant Manager Scheidel testified on direct examination that he did not observe any of supervisors of the shop perform production work through the years, although on cross-examination he recalled that at the Walden Avenue facility, Supervisor Sikirica did perform direct labor on the production floor. He also testified on cross-examination that he has on occasion seen at least some supervisors drive a forklift on occasion, load and unload trucks, handle material, read a blueprint, and that Supervisor Krzysiak had assisted workers with assembly work. He did not know if such work was charged to direct labor. In this respect, he explained that his understanding of "production" work was that it was limited to direct labor charged to a customer. Therefore, his testimony on direct examination and cross-examination was not necessarily inconsistent (Jastrzab also testified that "chargeable labor" meant the same thing as production work). Further, enhancing his credibility, Scheidel volunteered that half of Quarcini's time was supposed to be in the shop and that Quarcini was "out in the shop a lot."[39]

Scheidel also testified on cross-examination that he himself

[38] Inasmuch as their promotions were effective on September 25, their 90-day probationary period would have ended on about December 25, but this unexplained discrepancy is not material.

[39] Tr. 583–584.

operated a forklift and moved material in emergency situations (when time was of the essence or when employees were busy or unavailable) and that he understood this to be the case with other supervisors who were so engaged.

Jastrzab was a plant manager from 2012–2014, first at Military Road and then at the facility, supervising about nine shop employees at each location. He testified that in addition to his supervisory functions, he worked along the shop employees, primarily doing assembly work. At Military, he performed more supervisory work because the Company was transitioning the operation to Walden Avenue. Approximately 60 percent of his time at Walden was shop, 40 percent supervisory, varying by date.

The testimony of Howe, Dates, and Hoerner was consistent as far as Hoerner's position of warehouse/logistics supervisor, for which he was hired in February 2017. Dates testified that the position was created with the intention of having the incumbent assist the two material handlers (Greiner and McCarthy) with their jobs because the warehouse operation had grown. Dates drafted and approved a job description of this new position (R. Exh. 12). It sets out a range of responsibilities that fall within Section 2(11) of the Act, and Hoerner's status as a statutory supervisor is uncontested. Under essential functions, there is greater description of his supervisory functions. There is also, "Fork truck operations required," which is reaffirmed in the qualifications section. The ADA requirements section lists various physical requirements, including sitting at least 50 percent of the time, and frequent body motions such as bending at the waist and using hands and fingers to grasp and handle objects and tools.

Dates testified that Hoerner was expected to do the same work as his subordinates 10–20 percent of the time but that he is now performing less of such work (about an hour or 10 percent of his day) because his clerical responsibilities have substantially increased because of a large increase in outgoing shipments. Hoerner testified that he has done all the functions that his employees do, including unloading trucks with forklifts in the parking lot or dock when they are unavailable. He further testified that he performs the same kind of work that they do approximately 15–20 percent of the time, on a fairly consistent basis.

E. Fess, Garcia, and Norway

Fess was lead material handler before he became a working supervisor, loading and unloading trucks and receiving material in shipping and handling. As material handling supervisor, he oversees three areas of the building–material handling, paint booth, and storage area, having a total of about seven employees.

Garcia was an assembler for about 6 or 7 months prior to his promotion to supervisor over assembly. He first supervised three to seven assemblers but shortly after the layoff in April 2018, was given responsibility over fabrication in building 5 and another 10 or so employees (whom Scheidel had previously supervised).

Before his promotion, Norway was a fitter/welder in the eFab department, where he read directions off a computer rather than using physical blueprints. He now supervises three employees in eFab.

F. Shop Supervisors as Statutory Supervisors

As a threshold issue, the General Counsel disputes the Respondent's assertion that Fess, Garcia, and Norway are statutory supervisors (GC Br. 19, et. seq., 61, et. seq.). The party asserting supervisory authority bears the burden of establishing such. *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1107 fn. 4 (1997).

Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

All three shop supervisors attend regular supervisory meetings with Voigt, at which Voigt reviews production goals, and they decide on assignments to particular employees. The supervisors post these assignments on a white board or convey them orally. They have the authority to reassign employees. Garcia partners with Fess in determining where employees should be assigned between their departments. Employees who want paid time off go to the shop supervisors for approval of such.

The shop supervisors are involved in the imposition of discipline of employees. In this regard, Garcia has been involved in four–five disciplines and recently recommended a verbal warning to an employee for being out of his work area for over 30 minutes, which recommendation Voigt and HR accepted. He also recommended such a discipline for Rulov for making a gesture that was taken the wrong way by a coworker, which recommendation was also accepted. Fess testified that the decision to discipline Mark Castilloux (see R. Exh. 23, a written warning that Fess signed) was a joint one among the shop supervisors. Norway testified without controversion that he was involved in a recent coaching issued to Thompson and told Thompson that he made the decision to issue it.

The shop supervisors have written performance reviews. Thus, Garcia wrote performance reviews for three assemblers and presented them to Voigt. In those reviews, he recommended whether the employee should receive other job duties they had requested or be put on a performance improvement plan. Norway submitted performance reviews of employees to Voigt, who made no changes to Norway's assessment.

Garcia has authority to order tools up to $250 on his own authority if he and the employee feel they are necessary; if the tools are over that amount, Garcia consults with Voight. As opposed to when he was a lead, Fess now has access to the computer to get blueprints.

Prior to their promotions, Fess, Garcia, and Norway wore the dark blue company shirts worn by production employees. They now wear tan shirts provided by the Company because Voigt stated that he wanted them to be more recognizable as supervisors to employees and customers. Initially, Garcia did not have an office and would go to any workstation in building 4 (assembly) and log in. Now, he shares an office with Voight; his desk is open to Fess and Norway.

Based on the above, I conclude that Fess, Garcia, and Norway are statutory supervisors within the meaning of Section 2(11) of

the Act, most notably in exercising independent judgement in assigning and directing unit employees, in initiating disciplinary actions, and in writing employee evaluations that form the basis for wage increases.

G. Unit Work Performed by Fess, Garcia, and Norway

Numerous witnesses, both for the General Counsel and for the Respondent, testified about the duties that the three shop supervisors (supervisors) perform. Although the accounts of witnesses for the General Counsel and those of witnesses for the Respondent varied as far as apportionment, almost all witnesses uniformly testified that the supervisors perform both supervisory functions and unit work. Determining with precision the breakdown of each activity is not possible. In this regard, Respondent's Exhibit 14, a summary of their direct and indirect labor charges through August 2017, does not necessarily reflect all their unit work; all "direct" entries were for production (unit) work, but an unknown percentage of the "indirect" entries may also have been for unit (but nonproduction) work.

Fess

Fess testified in detail and without hesitation, and he made no apparent efforts to skew his descriptions of his duties. As far as performing unit work, Fess has helped in every department that he supervises except that he does not help or unload the burn table. He still does some of the same work that he did as leadman, including using a forklift to load and unload. In this regard, when asked what types of production work he performs, he answered in detail and without hesitation: at the start, probably 30 percent of his work was shop work; now, it is approximately 50 percent. His direct hours reflected in Respondent's Exhibit 14 are not necessarily inconsistent with his testimony.

Garcia

As far as performing unit work, when Garcia started as supervisor, his work was approximately 50 percent supervisory and 50 percent labor. As time went on, he performed more supervisory responsibilities, so that the ratio changed to 70 percent supervisory. Now, about 95 percent is supervisory because of his being given a greater area of responsibility. The percentages vary depending on the workload for the week. His direct hours in Respondent's Exhibit 14 are not necessarily inconsistent with his testimony. His assembly work now is primarily light duty applications, quick jobs taking maybe 5 minutes and maybe not requiring tools. He has had occasion to work with the 17–18 or so employees whom he supervises, depending on the volume of work.

From October 10–December 9, 2017, Muench took notes of the production work that he observed the shop supervisors, primarily Garcia, performing (GC Exh. 53). He conceded that not all the times that he recorded were exact. Garcia reviewed Muench's notes and testified that some were accurate, but others were not. He explained that on some days, he has put in 8 hours of direct labor depending on the workload.

Norway

In terms of performing unit work, Norway testified that he spends approximately 30 percent of his time doing production work, fitting product together, but that he no longer does any welding. General Counsel's Exhibit 71 on its face contradicts Norway's testimony that he did no welding. However, Norway explained that on the day in question, he was welding a framework for a dry erase production board on which supervisors let workers know what product they next need to go on—a task related to his supervisory functions.

Norway also testified that when he first became a supervisor, his work was 50 percent production work, 50 percent supervisory and that 80 percent of his time is now spent in supervision. Respondent's Exhibit 14 supports his testimony that his amount of production work has decreased but not the percentages that he gave. It shows that in October 2017, 79.3 percent of his time was spent on direct labor, and that in August 2018, the figure was 46.47 percent, or almost half. In this regard, Howe testified that Norway has a smaller group, so he does more direct or production work than Fess or Garcia.

Analysis and Conclusions

The General Counsel argues that (1) the promotions of these three shop employees to shop supervisors in September 2017; (2) their performance of unit work, without affording the Union an opportunity to bargain; and (3) their pay raises in January 2018, violated Section 8(a)(5) and (1) of the Act.

Their Promotions to Shop Supervisors

An employer has the right to select individuals for supervisory positions and is therefore not obliged to bargain with a union over promoting unit employees to supervisors. *Hampton House*, 317 NLRB 1005, 1005 (1995); *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 628 (1984). Therefore, I find no merit to the allegation that the Respondent violated the Act by promoting Fess, Garcia, and Norway to "shop supervisors."

Their Continued Performance of Unit Work

Assignment of work is a mandatory subject of bargaining. *WCCO-TV*, 363 NLRB No. 101, slip op. at 2 (2015); *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003). Therefore, absent a waiver by a union, an employer must notify and offer to bargain about removal of bargaining unit work before it may assign such work to newly created supervisory positions, whether such supervisors are newly hired or promoted from within the unit. *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 (1998), enfd. 182 F.3d 904 (3d Cir. 1999), citing *Hampton House*, 317 NLRB 1005 (1995); see also *Stevens International*, 337 NLRB 143, 143 (2001); *Regal Cinemas, Inc.*, above at 304 ("[W]e emphasize . . . that the reclassification of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work."). The Respondent has not contended any waiver on the Union's part; rather, the Respondent contends that supervisors have always performed unit work and that the current supervisors' performance thereof is consistent with past practice.

The Respondent's argument ignores a fundamental difference between Fess, Garcia, and Norway and previous supervisors/managers who performed what is now bargaining unit work—in the past, no union represented employees, and no bargaining unit existed from which work could have been removed. Furthermore, to the extent that Hoerner may continue to perform

unit work that he performed before the Union was certified, such work was effectively never in the unit.

Unanimous testimonial and documentary evidence establishes that Fess, Garcia, and Norway have collectively performed and continue to perform more than a de minimis amount of bargaining unit work and thus their removal from the bargaining unit has had a measurable impact on unit work. The exact amount of such work that they perform vis-à-vis the amount of time they spend engaged in supervisory function is not the governing factor. Thus, in *Regal Cinemas*, ibid, the Board found a violation based on existing or newly hired managers' performance of bargaining unit work and specifically found it unnecessary to address the respondent's contention that they were also statutory supervisors and performing supervisory duties. See also *Hampton House*, above.

Accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act by having Fess, Garcia, and Norway, as shop supervisors removed from the unit perform, continue to perform bargaining unit work, without having afforded the Union the opportunity to bargain over the removal of that work from unit employees.

Their Wage Increases

The General Counsel contends that the shop supervisors are still unit employees and that the Respondent therefore violated Section 8(a)(5) and (1) by granting them wage increases in January 2018, without affording the Union notice and an opportunity to bargain. Inasmuch as I have concluded that they were statutory supervisors, the Respondent was not obliged to bargain their wages with the Union, and I therefore dismiss this allegation.

Light Duty Allegation—8(a)(5)

A. Garcia

In early December 2017, Supervisor Garcia was injured at work and was out for about 2 months. His physician provided a letter of January 18, 2018, stating that Garcia was under his care for his left foot, and he released Garcia to work light duty with restrictions, including desk work and ambulation in a cam boot (see GC Exh. 66). When Garcia returned on about January 29, 2018, he was placed on light duty.

The testimony of various witnesses was almost completely consistent on what Garcia did during his light duty period. Garcia returned on crutches and with an open-toe boot or shoe and did not do any direct labor. He performed some of the office functions that he normally did as a supervisor, handed out paperwork and wrote assignments on the white board on which job orders were posted, and received job training in supervisory functions at a desk in the management team or front office.

After that light duty period, there was a period during which Garcia transitioned to full regular duty, and he resumed full, unrestricted duty in about late May (see GC Exh. 57).

General Counsel's Exhibit 58 reflects that employee Kevin Farley (Farley) was injured in approximately March 2018 and placed in "light duty activities."

B. Bargaining Over Light Duty

Rosaci learned that Garcia was on light duty. Rosaci understood that the Company did not allow employees to work light duty, and he made a request for information concerning light duty assignments in the last 3 years (GC Exh. 36, dated January 18, 2018). Schroder replied on January 23 (GC Exh. 37), stating that there were no responsive documents and that the "collective memories" of the client could not recall any light duty assignments within the requested time frame.

Bertozzi admitted that at some point in negotiations, Rosaci asked about light duty, and Bertozzi replied, "[W]e don't have light duty."[40] Bertozzi testified that he was mistaken, "But I can't remember the context and, frankly, it doesn't come up very frequently. I don't know what I was thinking . . . ."[41] He averred that he could not remember how he discovered that he had been wrong. I find peculiar his testimony that he mistakenly made such a statement off the cuff without any foundation, as well as his convenient lack of recall of when he learned of his error.

In any event, the Respondent never afforded the Union an opportunity to bargain over the conditions of Garcia's return to work or his being placed on light duty.

C. Other Employees

Despite Bertozzi's statement, the Respondent submitted records showing that HR has documented employees for whom light duty work has been directed (R. Exhs. 28–33), as follows.

Greiner strained his back on the job in September 2015 and received a medical note putting him on medical restriction for a week or two as to lifting (15 pounds) (see R. Exh. 29). The lifting on his regular job was 50 pounds. Greiner's testimony implicitly confirmed that he was placed on light duty. Thus, he brought the note to Dates but did not request light duty because he knew no such positions were available. Nonetheless, he was assigned to shipping/receiving for that period and did not lift over 15 pounds.

Fess strained his groan and back area on the job on November 2015 (see R. Exh. 30). His physician placed him on light duty (not to lift over 5 pounds) for a week. Fess' testimony confirmed that he was placed on light duty; as per his supervisor's direction, he was not put on the forklift during that period.

Farley was placed on light duty in September 2016, and two other shop employees were placed on light duty in June 2014 and December 2016, respectively.

Domaradski and Thompson testified about instances when they were not given light duty. Domaradski suffered whiplash from a car accident in 2010, as a result of which his doctor put him on a lifting restriction. However, then Manager Mike Muench (Muench's father) told him that there was no light duty at the Company. Domaradski believes that could have done paperwork in the office.

Thompson was injured in 2009 and out of work for 10 months. He was released to work with restrictions, but HR told him that he could not come back to work until he was 100 percent able to do his job–pick up 50 pounds, kneel, bend, and weld. There were no other available jobs that he could have done with those

[40] Tr. 1661.

[41] Tr. 1670.

physical restrictions; however, he believes that he could have driven a forklift.

Analysis and Conclusions

Light-duty assignments are a mandatory subject of bargaining. *Jones Dairy Farm*, 295 NLRB 113, 115 (1989); see also *Industria Lechera De Puerto Rico, Inc.*, 344 NLRB 1075 (2005). The General Counsel contends that the Respondent unilaterally changed its policy concerning light duty work assignments when it placed Supervisor Garcia on light duty in late January 2018.

Company records produced at trial show that HR documented medical requests for employees to be placed on light duty restrictions in 2014–2016, and Fess and Greiner confirmed that they were placed on light duty in September and November 2015, respectively.

The General Counsel contends (GC Br. at 36 fn. 53) that the fact that HR directed that employees be put on light duty did not establish that they in fact were. However, there is a normal presumption that supervisors would carry out HR's directives, in the absence of any reason to believe otherwise, and no evidence was offered to the contrary.

Domaradski and Thompson testified about instances when they were refused light duty, in 2010, and 2009, respectively, but the General Counsel provided no evidence to show any denials of light duty in the years since then.

In sum, the General Counsel has not shown that there was in fact a unilateral change in light duty policy when Garcia (or Farley) were placed on light duty. That being the case, the Respondent had no bargaining obligation. In any event, Garcia was in a different situation when he was placed on light duty in that he was no longer a rank-and-file employee but in a supervisory role, and his light duties all involved supervisory functions or further training in them. Therefore, I find no merit to this allegation.

Mandatory Overtime—8(a)(5)

At negotiations on September 15, 2017, the Union made proposals for overtime pay (GC Exh. 24), including the provision that no discipline be imposed on any employee for refusing to work overtime. At the September 20 bargaining session, the Company countered on that provision with, "Overtime needed by the Company shall be mandatory, with volunteers (qualified by classification) taken first, and mandated if insufficient to fill need. . . ." At the next session, on about September 29, Rosaci asked if the Company had mandatory overtime, to which Schroder said no but that the Company wanted such a provision in a collective-bargaining agreement. Domaradski recalled her talking about mandatory overtime at one of those sessions in the context of the Company being very busy.

At all times material, Greiner and McCarthy were the warehouse shipping and receiving clerks supervised by Warehouse Supervisor Hoerner (Greiner resigned on September 11, 2018). Greiner worked for the Company for about 6 years; McCarthy has been employed for about 11 years.

Company policy is that overtime is strictly voluntary. Supervisors ask employees if they want to work overtime, and record on an overtime request form whether they accept or do not accept. Some employees generally do not choose to work overtime.

Consistent with this, there is no dispute that prior to approximately late November 2017, any overtime that Greiner and McCarthy worked was solely on a voluntary basis. Their regular hours were 7 a.m. to 3:30 p.m. FedEx trucks could come after 3:30 p.m., and management expected that they would be serviced (see R. Exh. 22, a notice posted in the shipping and receiving office). Greiner, McCarthy, and Hoerner would decide among themselves who would stay late and unload them. If necessary, Hoerner "borrowed" Material Handler Dave Wilhelm or another shop employee to do this. If the workload necessitated overtime, Greiner and McCarthy had the option of coming in early or leaving late, thereby working overtime on a voluntary basis. Greiner turned down overtime offers from Hoerner and was never disciplined as a result. No employee in shipping and receiving has ever been disciplined for turning down an overtime offer.

The only occasion prior to late 2017 when McCarthy was told that he was required to work overtime was at the Military Road facility about 7 years ago. At that time, Supervisor Robert Trzecki (Trzecki) told McCarthy and the other shipping and receiving clerk that starting the following Saturday, they would have to work overtime or be fired. McCarthy complained to Bertozzi, and Trzecki rescinded his directive.

Greiner testified that in November 2017, Manager Dates and Supervisor Hoerner told him and McCarthy in the shipping and receiving office that they would be on indefinite mandatory overtime and that the Company did not know when it would end. They said that Greiner and McCarthy could continue to come in on their regular starting time of 7 a.m. but needed to work until 4:30 p.m. instead of 3:30 p.m. In approximately the third week in December, Dates and Hoerner met with them in the same office. Dates stated that they were caught up and the season was ending, so their mandatory overtime was ending.

McCarthy's account differed somewhat in details but not in gist. Thus, he testified that in approximately November or December 2017, in the shipping and receiving office, Hoerner informed them that Dates had told him that they be would be working overtime immediately, starting the next day, until the backlog of work was completed. They had discretion when they would perform the overtime, and they worked approximately 30 extra hours a week for about 3 weeks. At the end of that period, Hoerner stated that they no longer needed to work mandatory overtime.

Neither Dates nor Horner specifically addressed the accounts of Greiner or McCarthy concerning the imposition of mandatory overtime in November–December 2017, and I find that they were both required to work overtime daily during that period. Rosaci was never informed that shipping and receiving or any other employees were going to be required to work mandatory overtime; he learned of this after the fact from Greiner.

Analysis and Conclusions

Institution of mandatory overtime is a mandatory subject of bargaining. *Michigan Sprinkler Co.*, 308 NLRB 1329 (1992); see also *Highland Superstores*, 301 NLRB 199 (1991). As I stated earlier, the Respondent had an obligation to not implement changes absent an overall impasse on bargaining. See the cases I cited regarding the layoffs.

The Respondent's second answer (GC Exh. 1(a)(a)) admits

the imposition of mandatory overtime in the shipping and receiving department but contends that it was consistent with past practice. The evidence does not support this conclusion. Company policy is that overtime is on a voluntary basis, and this was the practice in shipping and receiving prior to about late November 2017. At negotiations on about September 29, 2017, Schroder stated that the Company wanted a mandatory overtime provision in a collective-bargaining agreement, but no such provision was ever negotiated.

In about late November 2017, Manager Dates and/or Supervisor Hoerner told Greiner and McCarthy that, starting immediately, they both would have to work overtime because of a backlog until they were caught up. They in fact did so for several weeks. Prior to this, the Respondent never gave the Union notice or an opportunity to bargain.

Based on the above, I conclude that the Respondent violated Section 8(a)(5) and (1) by imposing mandatory overtime on Greiner and McCarthy without first affording the Union notice-and an opportunity to bargain.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Interrogated an employee about his union sympathies, in September 2017.

(b) Gave employees the impression of surveillance of their union activities and sympathies, in September 2017 and in January 2018.

(c) Informed or implied to employees that employees who supported the Union would be laid off, in January 2018.

(d) Threatened or implicitly threatened employees with reprisals if they supported the Union or showed support for the Union, in January and April 2018.

(e) Denied an employee's request for union representation at an interview that the employee reasonably believed could result in discipline, and conducted the interview, in October 2017.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

(a) Suspended Dennis Bush in December 2017.

(b) Assigned William Hudson to the saw in April–June 2018.

(c) Refused to give Hudson overtime during that period.

(d) Failed to provide annual performance reviews and accompanying wage increases to shop employees consistent with past practice, from about October 2017–April 2018.

(e) Laid off shop employees in February 2018.

5. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

(a) Exercised discretion in imposing discipline without affording the Union notice and an opportunity to bargain, in October and December 2017.

(b) Failed to afford the Union an opportunity to bargain over providing annual performance reviews from about October 2017–April 2018;

(c) Failed to afford the Union an opportunity to bargain over wages increases, since May 2018.

(d) Failed and refused to provide the Union with information that it requested that was relevant to annual performance reviews, since May 2018.

(e) Failed and refused to afford the Union notice and an opportunity to bargain over the layoffs of February 2018.

(f) Removed bargaining work from the unit and transferred it to supervisors without affording the Union prior notice and an opportunity to bargain, in September 2017.

(g) Required employees to work overtime without affording the Union notice and an opportunity to bargain, in about late November 2017.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having denied shop employees timely performance evaluations and concomitant wage increases in violation of Section 8(a)(3) and (5); laid off 10 shop employees in violation of Section 8(a)(3) and (5); suspended Dennis Bush in violation of Section 8(a)(3) and (5); changed the assignment of William Hudson and denied him overtime in violation of Section 8(a)(3); and suspended John Fricano in violation of Section 8(a)(5), must make them whole for any loss of earnings and other benefits suffered as a result of these actions.

Specifically, the Respondent shall make those employees whole for any losses, earnings, and other benefits that they suffered as a result of those actions. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.,* 364 NLRB No. 93 (2016), the Respondent shall compensate laid off employees for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra., compounded daily as prescribed in *Kentucky River Medical Center,* supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate them for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 3 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security

Administration at the appropriate time and in the appropriate manner.

The Respondent shall expunge from its records any and all references to the suspensions of Dennis Bush and John Fricano and remove the language in Dmytro Rulov's 2018 evaluation that he should focus on work.

The Respondent shall bargain in good faith, on request by the Union, on performance evaluations and wage increases, layoffs and recalls, overtime, and removal of unit work.

The Respondent shall afford employees union representation, on their request, before conducting interviews that the employees reasonably believe could result in discipline.

The Respondent shall provide the Union with information that it requests that is necessary and relevant to its functions as collective-bargaining representative.

Inasmuch as the unilateral change in overtime was discontinued, and the other changes do not lend themselves to rescission, I will not order such as an affirmative remedy.

The General Counsel requests that I order an extension of the 1-year certification year because the Respondent violated its statutory bargaining obligations (GC Br. 84, et. seq.).

Section 9(c)(3) of the Act bars a petition filed within 12 months from the date of the last election, to ensure the parties a reasonable time in which to bargain without outside interference or pressure, such a rival petition; absent unusual circumstances, an employer is required to honor a certification for a period of 1 year. *Mar-Jac Poultry Co.*, 136 NLRB 786 (1962), citing *Brooks v. NLRB*, 348 U.S. 96, 101–103 (1954). In *Mar-Jac*, the Board held that the certification year should be extended for a period of at least 1 year of actual bargaining where an employer failed or refused to bargain in good faith with the union during that 1-year period. The Board has further held that the certification year should be extended in cases in which the employer has engaged in pervasive and extensive illegal practices that commenced at the outset of bargaining. *Honda*, 321 NLRB 482, 483 (1996), citing *Thill, Inc.*, 298 NRLB 669 (1990), enfd. in relevant part 980 F.2d 1137 (7th Cir. 1992).

In determining whether the record supports the need for a *Mar-Jac* remedy and the appropriate length of an extension, the Board examines "the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations." *Mercy, Inc.*, 346 NLRB 1004, 1005 (2006), citing *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), and *Metta Electric*, 338 NLRB 1059, 1065 (2003), enfd. in relevant part 360 F.3d 904, 912–913 (8th Cir. 2004).

In *St. George Warehouse, Inc.*, 341 NLRB 904, 909 (2004), the Board reversed the judge and found that a 1-year extension of the certification year was not warranted where the employer had made unilateral changes and failed to furnish information but had not engaged in surface bargaining. The Board concluded that these violations had not tainted the parties' negotiations.

Further, in *Cortland Transit, Inc.*, 324 NLRB 372, 372 (1997) the Board denied a *Mar-Jac* remedy where the employer had not only made unilateral changes and failed to provide information but had also engaged in violations of 8(a)(3) by withholding and refusing to grant regularly scheduled wage increases and by issuing a written warning to an employee. The Board concluded that there was no general allegation that the Respondent had failed or refused to recognize the Union or to meet and bargain with the Union in good faith following its certification, and no indication that the unfair labor practices had affected the parties' negotiations. Finally, in *American Rubber and Plastics Corp.*, 200 NLRB 867, 876–877 (1972), a *Marc-Jac* extension was found unwarranted despite (a) numerous violations of Section 8(a)(1), including, inter alia, interrogation, threats, promises of benefits, and giving the impression of surveillance; (b) 8(a)(3) discharges, transfers, and withholding of a Christmas bonus; and (c) 8(a)(5) withholding of that bonus.

In sum, the number and range of unfair labor practices that a respondent has committed are not dispositive; rather, there must be a showing that those unfair labor practices undermined the bargaining process to the extent that meaningful bargaining was precluded.

There is no allegation here that the Respondent failed or refused to recognize the Union or to meet with it after its certification, or engaged in surface bargaining. Indeed, the parties first met for negotiations the month following certification in June 2017, and have met approximately 36 times. No impasse has been declared. The Respondent, although failing in its obligation to bargain over a number of unilateral changes, did discuss various subjects in depth and did provide a considerable amount of information that the Union requested.

In these circumstances, I deny the General Counsel's request for an extension of the 1-year certification year.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

The Respondent, Wendt Corporation, Cheektowaga, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees for their support of Shopmen's Local Union No. 576 (the Union) by: (1) laying them off, (2) delaying their performance reviews and wage increases, (3) suspending them, (4) assigning them to undesirable work, (5) denying them overtime, or (6) or taking any other adverse action against them.

(b) Interrogating employees about their union sympathies.

(c) Giving employees the impression of surveillance of their union activities and sympathies.

(d) Informing or implying to employees that employees who support the Union will be laid off.

(e) Threatening or implicitly threatening employees with reprisals if they support or show support for the Union.

(f) Denying employees' requests for union representation at interviews that they reasonably believe can result in discipline, and then conducting such interviews.

(g) Failing and refusing to bargain collectively with the Union by laying off employees, removing unit work and assigning it to supervisors, delaying performance reviews and wage increases, imposing disciplinary discipline, mandating overtime, or

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

implementing other terms and conditions of employment without affording the Union notice and an opportunity to bargain.

(h) Failing and refusing to bargain collectively with the Union by laying off employees, removing unit work and assigning it to supervisors, delaying performance reviews, imposing disciplinary discipline, mandating overtime, or implementing other terms and conditions of employment when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached an overall good faith impasse.

(i) Failing and refusing to provide the Union with information that it requests that is relevant and necessary to its performance of its duties as collective-bargaining representative.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees who were not timely provided their annual performance evaluations and wage increases, laid off employees, and Dennis Bush, and William Hudson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Make John Fricano whole for any loss of earning and other benefits suffered as a result of his unlawful suspension in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions of Dennis Bush and John Fricano, and within 3 days thereafter notify them in writing that this has been done and that the suspensions will not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, remove from Dmytro Rulov's 2018 evaluation the language that he should focus on work, and within 3 days thereafter notify him in writing that this has been done.

(e) Bargain in good faith with the Union as the exclusive representative of all full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) Notify and on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment.

(g) Bargain with the Union on the retroactivity of pay increases conferred in 2018.

(h) Provide the Union with the information that it requested since on about May 24, 2018, regarding the dates of performance reviews and wage increases to nonunit employees.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Cheektowaga, New York, copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 15, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Shopmen's Local Union No. 576 (the Union) is the exclusive representative of a unit consisting of our full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen, and shipping and receiving clerks.

WE WILL NOT discriminate against you for your support of the Union by (1) laying you off, (2) delaying your performance

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

reviews and wage increases, (3) suspending you, (4) assigning you to undesirable work, (5) denying you overtime, or (5) taking any other adverse action against you.

WE WILL NOT interrogate you about your union sympathies, give you the impression of our surveillance of your union activities and sympathies, inform or imply to you that employees who support the Union will be laid off, or threaten you with reprisals if you support or show support for the Union.

WE WILL NOT deny your requests for union representation at interviews that you reasonably believe can result in discipline, and then conduct such interviews.

WE WILL NOT lay you off, remove unit work and assign it to supervisors, conduct performance reviews, impose disciplinary discipline, mandate overtime, or implement other terms and conditions of employment without affording the Union notice and an opportunity to bargain.

WE WILL NOT lay you off, remove unit work and assign it to supervisors, conduct performance reviews, impose disciplinary discipline, mandate overtime, or implement other terms and conditions of employment when we are engaged in negotiations for a collective-bargaining agreement and have not reached an overall good faith impasse.

WE WILL NOT fail and refuse to bargain with the Union over the retroactivity of wage increases.

WE WILL NOT fail and refuse to provide the Union with information that it requests that is relevant and necessary to its performance of its duties as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make laid off employees; employees who did not timely receive their performance reviews and pay increases; Dennis Bush, who was suspended; and William Hudson, who was assigned undesirable work and denied overtime, whole for any loss of earnings and other benefits suffered as a result of our discrimination against them in the manner set forth in the remedy section of the decision.

WE WILL make John Fricano whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in the manner set forth in the remedy section of the decision.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the unlawful suspensions of Dennis Bush and John Fricano, and within 3 days thereafter notify them in writing that this has been done and that the suspensions will not be used against them in any way.

WE WILL remove from Dmytro Rulov's 2018 evaluation the language that he should focus on work, and within 3 days thereafter notify him in writing that this has been done.

WE WILL bargain in good faith with the Union as the exclusive representative of the unit described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment.

WE WILL bargain with the Union on the retroactivity of pay increases conferred in 2018.

WE WILL provide the Union with the information that it requested since on about May 24, 2018, regarding the performance reviews and wage increases of nonunit employees.

WENDT CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-212225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.